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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~606~~ 12

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, APPELLANT,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED NOVEMBER 12, 1957
PROBABLE JURISDICTION NOTED JANUARY 6, 1958

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State of Minnesota, 1
In Supreme Court.

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin. 4th Judicial District.

STATE OF MINNESOTA,
Plaintiff, 2

vs.

NORTHWESTERN STATES PORTLAND CEMENT CO.,
Defendant.

COMPLAINT.

Plaintiff for its complaint against the above named defendant alleges:

I.

That the above named defendant failed to file 3 a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1933; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income for said year; that the said defendant failed to file such return of income within

thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1933, for the defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $806.48; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $40.32 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $512.70 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a second cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30,

1934; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1934, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $2530.92; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $126.55 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $1997.18 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a third cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1935; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1935, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $1734.29; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $86.71 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $1296.05 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a fourth cause of action against defendant, plaintiff alleges: 1

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the Fiscal year ending November 30, 1936; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after 2 such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1936, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $4240.29; that the Commissioner of Taxation 3 duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $212.01 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $2990.27 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax

1 together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a fifth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1937; that the Commissioner of Taxation on or
2 about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November
3 30, 1937, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $4875.78; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $243.79 and interest accrued at the rate of

four per cent per annum on said unpaid tax in the amount of $3234.24 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid. 1

For a sixth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1938; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1938, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $4510.41; that the Commissioner of Taxation duly made demand for the payment of said tax; 2 3

that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $225.52 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $3241.12 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a seventh cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1939; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1939, for the said defendant based upon information available to him and assessed a tax on

the basis thereof; that the tax determined upon the face of said return was in the amount of $6215.48; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $310.77 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $3600.17 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For an eighth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1940; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section

44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1940, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $4992.95; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $249.65 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $2682.68 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a ninth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1941; that the Commissioner of Taxation on or about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days

after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1941, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $7543.57; that the Commissioner of Taxation duly made demand for the payment of said tax; that the said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $377.18 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $3734.07 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a tenth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1942; that the Commissioner of Taxation on or

about June 9, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1942, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $3277.92; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $163.90 and interest accrued at the rate of four per cent per anum on said unpaid tax in the amount of $1634.25 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For an eleventh cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1943; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1943, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $10.14; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $.51 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $4.31 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the com-

mencement of this action, no part thereof has been paid.

For a twelfth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1944; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1944, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $2496.32; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $124.80 and interest accrued at the rate of four per cent per annum on said unpaid tax in

the amount of $920.89 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a thirteenth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1945; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1945, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $3462.01; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said re-

turn and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $173.10 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $1132.90 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a fourteenth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1946; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1946, for the said defendant based upon information available to him and assessed a tax on

the basis thereof; that the tax determined upon 1
the face of said return was in the amount of $8035.85; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $401.79 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $2292.32 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax to- 2
gether with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a fifteenth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 3
1947; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days after such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Sec-

tion 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1947, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $4114.51; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $205.73 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $1000.81 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

For a sixteenth cause of action against defendant, plaintiff alleges:

I.

That defendant heretofore failed to file a return of its income with the Commissioner of Taxation for the fiscal year ending November 30, 1948; that the Commissioner of Taxation on or about October 21, 1949, duly demanded of said defendant that it file a return of its income for said year; that the said defendant failed to file such return of income within thirty (30) days af-

ter such demand was duly made upon it; whereupon the Commissioner of Taxation on or about February 7, 1950, by the authority vested in him by Laws of Minnesota, 1933, Chapter 405, Section 44, as amended, made and filed a return of income for the said fiscal year ending November 30, 1948, for the said defendant based upon information available to him and assessed a tax on the basis thereof; that the tax determined upon the face of said return was in the amount of $8370.53; that the Commissioner of Taxation duly made demand for the payment of said tax; that said defendant by its failure to file said return and pay the tax thereon on the due date prescribed by law incurred a penalty in the amount of $418.53 and interest accrued at the rate of four per cent per annum on said unpaid tax in the amount of $1684.55 calculated to December 1, 1953; that although the Commissioner of Taxation has demanded payment of said tax together with penalty and interest thereon from the defendant before the commencement of this action, no part thereof has been paid.

Wherefore, the State of Minnesota demands judgment against defendant for the sum of $102,536.82, together with interest on the sum of $70,578.31 from December 1, 1953, together with its costs and disbursements herein.

STATE OF MINNESOTA,
J. A. A. BURNQUIST,
Attorney General,
JOSEPH S. ABDNOR,
Assistant Attorney General,
209 State Office Building,
St. Paul, Minnesota,
Attorneys for Plaintiff.

(Title of Cause.)

ANSWER.

Defendant, as and for its answer to plaintiff's complaint herein:

I.

Alleges that defendant above named is and was, on the date of attempted service of summons in the above-entitled action, a corporation organized and existing under and pursuant to the laws of the State of Iowa and was not and is not subject to service of process within the State of Minnesota.

II.

Alleges that on the date of said attempted service of process on defendant, defendant was not and never has been engaged in doing business within the State of Minnesota so as to sub-

ject defendant to the jurisdiction of the above Court; that the attempted service of process herein was and is invalid and wholly void as being contrary to the provisions of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. 1

For a second and further defense:

I.

Realleges paragraph I of defendant's first defense herein. 2

II.

Alleges that defendant has not been properly served with process in this action in accordance with the requirements of law and the applicable Minnesota Statutes providing for service of process on foreign corporations, and that the above Court has not acquired jurisdiction over the party of defendant herein.

For a third and further defense:

Alleges that plaintiff's complaint fails to state facts sufficient to constitute a cause or causes of action or a claim against this defendant upon which relief can be granted. 3

For a fourth and further defense:

I.

Realleges paragraph I of defendant's first defense herein.

1

II.

Alleges that the attempted imposition of the tax, penalties and interest referred to in plaintiff's complaint, and the applicable Minnesota Statutes under which said imposition is attempted, being Chapter 290, Minnesota Statutes 1949, and in particular 290.03 thereof, are invalid and void as being in conflict with and in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States.

2

III.

Alleges that the attempted imposition of the tax, penalties and interest referred to in plaintiff's complaint, and the applicable Minnesota Statutes under which said imposition is attempted, being Chapter 290, Minnesota Statutes 1949, and in particular 290.03 thereof, are invalid and void as unjustly discriminating against this defendant in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

3

IV.

Alleges that the attempted imposition of the tax, penalties and interest referred to in plaintiff's complaint, and the applicable Minnesota Statutes under which said imposition is attempted, being Chapter 290, Minnesota Statutes 1949, and in particular 290.03 thereof, are invalid and void as depriving defendant of its property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Con-

stitution of the United States, by imposing a tax on the income of defendant which arises from and is a result of business conducted without and beyond the State of Minnesota and the jurisdiction thereof. 1

Wherefore, defendant demands judgment:

1. That the return of service herein be quashed, or that this action be dismissed for lack of proper service of process, or

2. That plaintiff's action herein be dismissed for lack of jurisdiction of the Court over the party of defendant, or 2

3. That this action be dismissed as being in violation of the provisions of the Constitution of the United States, and

4. That defendant have judgment for its costs and disbursements herein.

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Of Counsel:
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Mason City, Iowa.

(Title of Cause.)

2 TRANSCRIPT OF TESTIMONY.

The above entitled cause, being on the General Term Calendar of the above named Court, came duly on for hearing before the Honorable Paul S. Carroll, one of the judges of the above named Court, without a jury, on November 8 and 9, 1954, Joseph S. Abdnor, Esq., Assistant Attorney General, and Arthur Roemer, Esq., Special Assistant Attorney General, appearing as attorneys for the plaintiff, and Bundlie, Kelley, Finley &
3 Maun by Joseph A. Maun, Esq., and Earl Smith, Esq., appearing as attorneys for defendant. The following proceedings were then and there had:

Mr. Maun: May it please the Court, I would like to move the admission of Mr. Earl Smith of Mason City, Iowa, an attorney from Iowa, as associate counsel for the purpose of this case.

The Court: We will recognize him here, yes.

WILLIAM G. BURKMAN, 1
called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Abdnor:

Q. You have stated your full name?

A. William G. Burkman.

Q. Where do you live?

A. St. Paul.

Q. What position do you hold with the State of Minnesota? 2

A. Director of the Income Tax Division of the Department of Taxation.

Q. How long have you held that position?

A. I have been Director of the Income Tax Division, of the present Department of Taxation, since July 1, 1939, and I held a similar position under the old Minnesota Tax Commission from on or about August 31, 1936, up to 1939.

Q. Were you with the Division prior to July 1, 1936? 3

A. Yes, sir.

Q. What position did you hold?

A. Corporation Tax Examiner.

Q. Will you state briefly your duties with respect to your administrative position as head of the Income Tax Division?

A. My duties include the general supervision and direction of all the activities of the Division, including the preparation of income tax forms, in

assisting in the preparation and promulgation of the regulations, interpreting provisions of the Income Tax law, the direction of the receipt of returns, the receipt of money, the audit of those returns, and the filing and processing of the same.

Q. Briefly then, all of the operations of the Income Tax Division are under your administration?

A. Yes, sir.

Q. Are the files and records of the Income Tax Division kept under your direction and control?

A. They are.

(Plaintiff's Exhibits A to P, inclusive, were marked for identification.)

Q. Mr. Burkman, I hand you a group of documents stapled together. The top sheet is identified as Plaintiff's Exhibit A, and I will ask you if you can identify that group of documents?

A. I can.

Q. Will you state what it is, sir?

A. They are copies of the corporation income tax returns of Northwestern States Portland Cement Company, an Iowa corporation, Mason City, Iowa.

Q. I refer you to the last page of this exhibit and ask you whose signature is at the bottom of that?

A. That is my signature.

Q. A copy of your signature?

A. A copy, yes, sir.

Q. That means that you signed that document, the original of it? 1

A. Yes, sir.

Q. Inasmuch as you have identified and signed this document, what does your signature indicate?

A. My signature indicates that this document was filed by the Income Tax Division for the taxpayer.

Mr. Abdnor: I offer in evidence Plaintiff's Exhibit A.

Mr. Maun: Mr. Abdnor, all of these exhibits are alike, except for different years. 2

Mr. Abdnor: Different figures and different contents.

Mr. Maun: I was wondering if you could show them all to us.

Mr. Abdnor: I was going to offer the others in a group.

Mr. Maun: I will save my objection until you offer them all.

By Mr. Abdnor:

Q. Mr. Burkman, I hand you now Plaintiff's Exhibits B through P and ask you if it is not a fact that they are documents for different years, but otherwise substantially the same as to information that you have given with respect to Exhibit A? Are they, so far as, except for detail of preparation and for years involved—I am trying to expedite this—are they prepared in the same manner as Exhibit A? 3

A. They were all prepared by the Division for the taxpayer, and they all relate to Northwestern States Portland Cement Company, and they are fiscal years from 1933 on up through 1947.

Q. Then these, like Exhibit A, are income tax returns with the name Northwestern States Portland Cement Company on the face of them, prepared by the Department and signed by you?

A. That is correct.

Q. The original of these documents is a part of the files and records of the Income Tax Division?

A. They are.

Q. You have the originals here in court, as a matter of fact, have you not?

A. Yes, sir.

Mr. Abdnor: Your Honor, I can expand on the identification of these documents.

Mr. Maun: I have no objection to foundation, no objection.

The Court: Received.

(Plaintiff's Exhibits Q and R were marked for identification.)

By Mr. Abdnor:

Q. Mr. Burkman, I hand you a document entitled Plaintiff's Exhibit Q, and I will ask you if you can identify that?

A. I can.

Q. Will you state what it is.

A. It is a copy of a letter sent to Northwestern States Portland Cement Company, Mason

City, Iowa, under date of February 8, 1950, informing them that we had written them at various times requesting that they either file State Corporation Income Tax Returns, and that we have not received such returns, and accordingly under our authority from Section 290.47 of the Income Tax Act "We have prepared returns for you from such information as we could obtain and have assessed a tax on the basis thereof for each year." It ends up by saying, "We are enclosing statements of account showing the amount of tax, penalty and interest assessed for each year. Kindly send remittance for the full amount shown on these statements within ten days from the date of this letter, or the accounts will be given to the Attorney General with instructions to bring immediate suit against you for the recovery of these liabilities."

Mr. Abdnor: Plaintiff's Exhibit Q is offered in evidence.

Mr. Maun: No objection.

The Court: Received.

By Mr. Abdnor:

Q. I hand you Plaintiff's Exhibit R. Can you identify that?

A. I can.

Q. State what it is.

A. It is a letter to Northwestern States Portland Cement Company, First National Bank Building, Mason City, Iowa, dated October 21, 1949, informing the corporation that "Section 33 of the Minnesota Income and Franchise Tax Act

requires every corporation to file a Minnesota State Income and Franchise Tax Return if its taxable income was in excess of $1000 or if its gross income was in excess of $5000. Therefore, even if net income was less than $1000, a return still must be filed if gross income was in excess of $5000. According to our records you have not filed Minnesota State Income and Franchise Tax Returns for the years shown above. Demand is hereby made upon you under Section 44 of the Act to file returns for the periods shown above within 30 days from the date of this letter and to pay the full amount of the tax shown to be due on each return together with the penalty and interest imposed by the Act." The letter concludes with the statement that "If you fail to file the returns or the affidavits within 30 days from the date of this demand, returns will be prepared for you for these periods by the Commissioner of Taxation from the best available information and an assessment of tax will be made on the basis thereof, together with the penalties provided by Section 49 of the Act."

Mr. Abdnor: Exhibit R is offered in evidence.

Mr. Maun: No objection.

The Court: Received.

By Mr. Abdnor:

Q. Mr. Burkman, Exhibit R is dated in October of 1949, and I will ask you if Exhibit A was prepared by the Department subsequent to the date of Exhibit R?

A. It was. 1

Q. Was the tax assessed on the amount shown on Exhibit A for the fiscal year ending November 30, 1948?

A. Yes, sir.

Q. I should correct an earlier statement. November 30, 1948, was the latest year.

The Court: Starting in 1933 and to 1948, inclusive?

Mr. Abdnor: That's right, your Honor.

Q. Was the tax assessed in the amount shown on the face of each of the other exhibits, B through P? 2

A. Yes, sir.

Q. Mr. Burkman, you have before you State's Exhibit A. First, I will ask you upon what basis that exhibit was prepared?

A. It was prepared on the basis of the best information that was available at the time it was prepared.

Q. Does the tax assessed by virtue of that exhibit, Mr. Burkman, purport to tax all of the net income of this defendant for the year stated thereon? 3

A. It does not.

Q. Does it purport to tax a part of the income of this defendant for the year stated?

A. Yes, sir.

Q. First, referring to Exhibit A, the third sheet is headed "State of Minnesota, Department of Taxation, Schedule M, Apportionment Data,"

Would you explain the manner in which that purports to tax a portion of the income of this defendant? Give us briefly the meaning of that apportionment sheet?

A. First, the entire net income of the corporation amounted to $852,897.74. That is the entire net income earned everywhere. To that entire net income has been applied a percentage. The percentage was obtained by taking the arithmetical average of three factors; namely, first, the percentage obtained by taking the dollar value of the property situated in Minnesota compared to the dollar value of the property everywhere. Obtaining that produced a percentage of .1142%. The second factor is payroll. That is obtained by dividing the dollar payroll payments in Minnesota compared to the payroll payments everywhere. That produced a percentage of 1.6484%. The third factor in this arithmetical average formula is sales. That is the ratio of the sales within Minnesota compared to the sales everywhere, and that produced a percentage of 48.4493%.

By the Court:

Q. You mean this corporation did 48.49% of its business in Minnesota?

A. No, that is the amount of sales that have been assigned to Minnesota on this return as compared to sales made by the corporation everywhere.

Q. That is the same as saying 48% of their business was done in Minnesota?

A. No, I think it is a little different than saying 48% of their business was done here. 1

Q. Sales?

A. Forty-eight per cent of sales have been assigned on this return as having been made within Minnesota.

Q. You mean to Minnesota people, or are you down to that yet?

By Mr. Abdnor:

Q. Perhaps I could clarify that for the Court by asking what you attempt to put into the sales factor of a multi-state business of this type? 2

A. The sales made within Minnesota through, from, or by offices, stores and agents, and so forth, compared to sales made everywhere, with certain exclusions.

Q. Will you name the exclusions for the Court.

A. Well, the law does exclude certain sales that are made by the taxpayer's agents or agencies outside the state, with some other technical provisions. I don't have the Act here before me.

The Court: Well, if you are satisfied you have made the record. 3

By Mr. Abdnor:

Q. I am not sure yet. You were at the point where you had three factors. Now, proceed.

A. To arrive at the arithmetical averages of these, we had .1142% as the tangible property factor; 1.6484% as the payroll percentage; and 48.4493% as the sales percentage, giving us a

total of 50.2119%. We divide that by three and obtain a percentage of 16.7373%, and that percentage is applied against the entire net income of the corporation, with certain minor exclusions, and the result obtained by applying that to the net income of the corporation is the income assigned to Minnesota on which the tax is computed.

Q. Now, making reference to the testimony, you referred to exclusions. Will you expand on the exclusions a bit with respect to sales made by offices or agencies outside of the State of Minnesota?

A. Well, the law does provide that sales made by a taxpayer outside the State, by agencies chiefly situated at, or connected with premises owned or leased by the taxpayer for the transaction of business, shall be considered as non-assignable to the State.

Q. That is, if those premises are located outside of the State of Minnesota?

A. Yes, sir.

Q. Now, in the preparation of Exhibit A, you said that you made that up on the basis of the best information available to you. Does that answer stand with respect specifically now, to this apportionment data you have just recited to the Court?

A. Yes, sir.

Q. The apportionment data is based on the best information available to you?

A. That's right.

Q. Did you attempt to arrive at the apportionment on the basis of sales inclusions and exclusions that you have just recited?

A. We attempted to arrive at the sales percentage from the best information that was available at the time these returns were prepared.

Q. Now, Mr. Burkman, you have examined each of the exhibits, B through P?

A. Yes, sir.

Q. Without dealing specifically with each of those exhibits, was the method of apportioning income in Minnesota substantially the same, the method, that is, with respect to all of these other years as it was with respect to the year in Exhibit A?

A. I believe the same method was used as to all of these years.

Q. Your answer with respect to Exhibit A was that the entire exhibit was made up on the basis of the best information available to you. You may have covered this before, but is that true with respect to the other exhibits, B through P?

A. That is correct.

Q. Mr. Burkman, has any part of the tax assessed by virtue of Exhibits A through P been paid?

A. No, sir.

Mr. Abdnor: That is all.

CROSS EXAMINATION.

By Mr. Maun:

Q. Mr. Burkman, you testified, I believe, that you promulgated the regulations issued under the State Tax Law?

A. Promulgated them?

Q. Yes.

A. I thought I said that I supervised the preparation and promulgation. I supervised that, but I probably should add that I am under the direction of the Commissioner of Taxation, and subject to his approval, my statement is correct.

Q. You make the recommendations to him?

A. Yes, sir.

Q. Now, the Exhibits which you have prepared, A through P as a demand by you for this company to pay in accordance with the tax returns, that is exactly on the same kind of tax return that a domestic corporation would file and pay a tax on, is that correct?

A. May I ask, are you referring now to the apportionment directly, or are you referring to the entire return itself?

Q. Let's take all the returns before the apportionment formula to begin with.

A. No, a foreign corporation might be in a little different situation than a domestic corporation. I mean, they can be.

Q. Explain.

A. Certain income might be classified as non-apportionable on a foreign corporation, whereas a Minnesota corporation, it might not be.

Q. Does that refer primarily to dividends, interest, and royalties? 1

A. That's right.

Q. Aside from that, is there any difference in the return you have asked these people to file from what there is that you ask a domestic corporation to file?

Mr. Abdnor: I wonder if there might not be some confusion with respect to terms. Do you mean the blank form?

The Witness: Oh, that is the same.

By Mr. Maun: 2

Q. Identically the same, is that right?

A. Yes, sir.

Q. Then insofar as the apportionment matter is concerned, isn't it true that identically the same apportionment factors are used in arriving at the amount of income of a domestic corporation allocated to the State of Minnesota, as you have used in allocating the income of this corporation to the State of Minnesota?

A. I believe that is correct.

Q. Did you make any investigation at the time you made the demand and preparation of these returns to determine whether the income of this corporation was produced exclusively from Interstate commerce? 3

A. I don't know that that question came up during the investigation.

Q. Did you come to any determination in your determination of what the fact was?

A. You mean as to whether they were engaged in interstate commerce?

Q. That's right. That is not exactly my question. The question is whether or not you determined as a fact if this income was or was not all produced from engaging in interstate commerce?

A. Well, so far as I know, I don't believe that was.

Q. I don't understand your answer. Will you state what your answer is.

A. I thought your question was as to whether the question of whether this taxpayer was engaged in interstate commerce was a consideration in making up these returns.

Q. Was it a consideration?

A. It was not, that I know of.

Q. You answer is, it was not taken into account at all?

A. That would be my answer.

Q. I take it from listening to your answers to Mr. Abdnor that the levy which you seek to collect from this company is really based upon its total net income, wherever earned, as allocated and attributed to Minnesota under the formula you have used? Is that right?

A. That is right, with certain minor exclusions.

Q. That is, non-apportionable income?

A. That's right.

Q. Then if this income is all derived from interstate commerce, then the factors here take

into account only income derived from interstate commerce, isn't that right? 1

Mr. Abdnor: I wonder if that is not hypothetical?

Mr. Maun: Yes, it is hypothetical.

Mr. Abdnor: That is objected to on the ground it is hypothetical.

The Court: Sustained.

Mr. Maun: I have no further questions.

By the Court:

Q. Just one thing. On this percentage of sales, again, 48.49%, you said you excluded certain things from that. A Minnesota citizen, if he had written down to this company and ordered cement, would that be excluded? If he had written down to Iowa and ordered cement, would you include that kind of a sale? 2

A. It depends on what the selling company did in Minnesota.

Q. Well, suppose they had offices in every town in Minnesota, but I still write down to Iowa and order some cement, and they send it up to me. I am just asking you what you consider in establishing this percentage. You said if there were such an agency outside the State that the company could sell—whatever they sold to Minnesota people you didn't consider, or did I understand you correctly? 3

A. It is possible, say, that a corporation had an office in Superior, Wisconsin, and they had no office, no employees, no property of any kind in

the State of Minnesota, and the Minnesota individual ordered some goods from this office in Wisconsin, and that would be not classified as a Minnesota sale.

Q. That is a good example. Take one more example. Suppose they had an agent in Duluth and one in Superior, but somebody in Duluth went to Superior and ordered it and it was sent over by one of their trucks.

A. That would depend on just how that sale originated, whether the Minnesota office originated it.

Q. That didn't have anything to do with it.

A. Well, I suppose the same answer.

Q. It is not what the law is. The question is, what did you do under the circumstances?

A. You mean this particular case?

Q. Yes, in establishing it.

A. The information that was available to determine as to whether that sale should be assigned to Minnesota under the law, that is fully available—

Q. I understand that.

A. It had to be made up from the best information that was available. Now, this may include—it is possible that the sales total includes all the deliveries of goods into Minnesota. I say, it is possible.

Q. You mean that is up to them to determine this and to come in and tell you where you are wrong?

A. I assume so. 1

Q. But as far as your trying to establish it, you wouldn't intentionally take into consideration sales in Minnesota brought about by crossing the State line over into Iowa?

A. We wouldn't have any information included in the dollar sales in the Minnesota factor that did not belong there as a matter of law.

Q. Well, that is just your conclusion as to what the law is. It doesn't quite answer my question.

A. Based on what facts we could get, we would have excluded these sales. 2

Q. If you had known, for example, that any sale in this group had occurred between a Minnesota citizen and a company in Iowa, you would not have included it?

A. Provided the Minnesota office had nothing whatsoever to do with that sale.

By Mr. Abdnor:

Q. In other words, Mr. Burkman, I understand that if sales are made in Minnesota through an agent or agency on premises owned or leased by the taxpayer outside of this State, you would not include those sales in the Minnesota apportionment factor? 3

A. That is correct.

By the Court:

Q. One other question. The first factor was percentage of property in the State of Minnesota?

A. Yes, sir.

1 Q. And you found that to be .1142%. That would be less than one per cent?

A. It happened to be only $3,816.12 compared to $3,340,640.95.

Q. What was it, office equipment?

A. It is listed in here as equipment, furniture and fixtures.

Q. Did they have a warehouse here in which they stored their stuff?

A. No, sir, not that I know of.

The Court: All right, thank you very much.

2 Mr. Abdnor: That is all.

Mr. Maun: No questions.

Mr. Abdnor: That, your Honor, is the prima facie case for the State, and the State rests.

(An opening statement was made by Mr. Maun.)

(Defendant's Exhibits 1, 2 and 3 were marked for identification.)

Mr. Maun: Defendant offers in evidence Defendant's Exhibit 1, a certified copy of a certificate from the Secretary of State of the State of

3 Minnesota.

Mr. Abdnor: No objection.

The Court: That they are not licensed?

Mr. Maun: They are not qualified or never have been, to do business in the State of Minnesota.

The Court: Received.

Mr. Maun: Defendant offers in evidence Defendant's Exhibit 2, which is a copy of the cer-

tificate of incorporation, the charter, the original corporate charter of the defendant. 1

The Court: That is in Iowa?

Mr. Maun: That is in Iowa, yes, your Honor, a photostatic copy.

Mr. Abdnor: No objection.

The Court: Received.

Mr. Maun: Defendant offers in evidence Defendant's Exhibit 3 which is a photostatic copy of the original certificate of charter issued by the Secretary of State of the State of Iowa extending the corporate life of this corporation. 2

Mr. Abdnor: No objection.

The Court: Received.

Mr. Maun: I believe, your Honor, it will be stipulated that the sales included in the sales factor in Plaintiff's Exhibits A through P do not include any sales that were not delivered within the State of Minnesota, or sales that were delivered outside of the State of Minnesota.

Mr. Abdnor: With respect to that, your Honor, I have no reluctance in agreeing with Mr. Maun, that this sales factor does not include sales resulting in deliveries to customers outside of the State of Minnesota, for whatever it may be worth. 3

The Court: When you are ready to stipulate something for the record, you do it.

Mr. Abdnor: That is it.

The Court: Read it into the record when you are ready to stipulate.

Mr. Abdnor: Very well, I believe it may be

1 stipulated that included in the sales factor on the assessments made by the State, there were no sales which resulted in deliveries of cement to customers outside of the State of Minnesota. Is that correct?

Mr. Maun: That's right.

The Court: All right. I just want you to have your stipulation exactly accurate.

GILBERT BENTON PRAY,

called as a witness on behalf of the defendant,

2 being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Maun:

Q. Mr. Pray, were you once employed by the Northwestern States Portland Cement Company?

A. Will you step up closer? I won't hear you that far away.

Q. Where do you live, Mr. Pray?

A. Mason City, Iowa.

3 Q. During the past 30 years, by whom have you been employed?

A. Northwestern States Portland Cement Company.

Q. When did your employment commence?

A. 1929, in January.

Q. During that period of time, what positions did you hold with that company?

A. Assistant Sales Manager, and Sales Manager.

Q. How long were you Assistant Sales Manager? 1

A. From 1932 until 1941.

Q. After 1941 what was your position?

A. I was Sales Manager.

Q. Until what time?

A. Until July 1, 1954.

Q. Now, as Assistant Sales Manager, what were your duties?

A. My duties were to follow the salesmen and see that they performed and operated in accord with our general policy of operation. 2

Q. What were your duties as Sales Manager?

A. Well, practically the same except I had full charge and jurisdiction of all sales.

Q. Who was Sales Manager when you were the Assistant Sales Manager?

A. J. B. Cabanis.

Q. Now, Mr. Pray, I am going to ask you a series of questions and they will all relate to the period between 1933 and 1948, in case I should forget to remind you of that fact, so keep that in mind that they relate to the period of 1933 to 1948. 3

A. Okay.

Q. During that period of time, did your company have an office in the State of Minnesota?

A. Yes, we maintained an office in Minnesota.

Q. Where was that office maintained?

A. In Minneapolis.

1 Q. In what building?

A. The Roanoke Building.

Q. Did you own any real estate in the State of Minnesota?

A. No, sir.

Q. Under what arrangement was that office building had by your company?

A. What arrangement?

Q. Did you lease it?

A. We leased it, yes.

Q. What employees did your company have
2 residing in the State of Minnesota during this period of time?

A. In the entire state?

Q. Yes.

A. We had five. Do you want their names?

Q. Yes.

A. R. S. Sig, Willmar; Mr. Youngstrom, Faribault; Joe E. Meyer, Minneapolis; W. R. Wilkins, Minneapolis; and Harold Yokum, Minneapolis.

Q. Did you have any others, any other place in the State of Minnesota than in Minneapolis?
3

A. No, sir.

Q. Did Mr. Sig have an office out of which he worked?

A. No, sir, he operated out of his home.

Q. What territory did he cover?

A. Well, we described that as the north and southwestern parts. It would be the southwestern part of the state.

Q. What territory did Mr. Youngstrom cover? 1

A. The southeast portion of the state, Winona and Rochester.

Q. And Mr. Meyer?

A. Points north of Minneapolis, St. Cloud, Little Falls, that territory, and Alexandria.

Q. How about Mr. Yokum?

A. Mr. Yokum operated strictly in the Twin Cities area.

Q. How about Mr. Wilkins?

A. Mr. Wilkins operated in the same area, 2 the Twin Cities area.

Q. Did you have any other employees in the State of Minnesota?

A. Not as salesmen. We had a lady in the office, Mrs. Humphrey.

Q. What were her duties?

A. Her duties were to be on the job when these boys were out selling, keep taking care of telephone calls that came in from our customers from sources in the territory as well as Minneapolis and St. Paul, and she was a stenographer 3 too, she wrote up the orders and sent them down to Mason City, or telephoned them.

Q. Prior to the time Mrs. Humphrey worked for your company in the Minneapolis office, did you have other girls holding a similar position?

A. Prior to the time we hired her?

Q. Yes.

A. I think we had a girl prior to that, yes.

1 Q. What were her duties?

A. The same as Mrs. Humphrey's.

Q. Who hired the salesmen that lived in Minnesota?

A. Well, I hired Mr. Youngstrom. I think Mr. McDonald hired Mr. Sig. Mr. Joe Meyer was hired by Mr. McDonald. That was prior to my time. I hired Wilkins and Yokum as well as Mrs. Humphrey.

Q. Who is Mr. McDonald?

A. Mr. McDonald was assistant to the presi-
2 dent, and general manager of our company.

Q. Where was he located?

A. In Mason City.

Q. During all your term of employment, where were you located?

A. Mason City, Iowa.

Q. Have you ever resided in the State of Minnesota?

A. No, sir.

Q. Has Mr. McDonald ever resided in the State of Minnesota?
3

A. Not to my knowledge.

Q. Who hired the girls that worked in the Minneapolis office?

A. I did.

Q. Had any of these girls at any time been hired by any salesman residing in the State of Minnesota?

A. No. Salesmen have no authority to hire anyone.

Q. Do the salesmen have any authority to fire any employees? 1

A. No, sir.

Q. Do the salesmen have any authority to allocate territories among one another?

A. No, sir.

Q. Who negotiated the lease on the office space where the company has its Minneapolis office?

A. That is handled—I am not competent—by the secretary of our company, Mr. Andersen.

Q. Where does he live? 2

A. Mason City.

Q. Who handles the purchase of office furniture and equipment in the Minneapolis office?

A. I generally handle that.

Q. What type of personal property does the company have in Minnesota?

A. Personal property?

Mr. Maun: Your Honor, I wonder if it can be stipulated that these questions relate only to these years, 1933 to 1948, so we won't have to waste the time to keep repeating that. 3

Mr. Abdnor: It may be so understood.

The Court: I thought that is the way it is, you told him that to start with, that it only covered that period.

By Mr. Maun:

Q. What type of personal property do you have in the State of Minnesota, Mr. Pray?

The Court: You say "do you have".

1 The Witness: As I understand the question, it is the furniture and office equipment in the Minneapolis office.

By Mr. Maun:

Q. I had reference to the years 1933 to 1948, during the years 1933 to 1948, what kind of personal property did you have in the State of Minnesota?

A. Well, I think the answer is none.

Q. Did you have any office furniture and fixtures?

2 A. Yes, we had office furniture and fixtures. Is that personal property?

Q. Did you have any other type of personal property in the state?

A. No, sir.

Q. What type of furniture and fixtures did you have in this Minneapolis office?

A. Well, it consists of three desks and a couple of filing cabinets and a typewriter.

Q. How large is the Minneapolis office?

A. The Minneapolis office consists of three 3 rooms, one reception room in which there are two desks located, and that room is probably ten or fifteen feet. The other office is a private consulting room, and it is about ten by ten, and the other room is strictly a storage room, about six by eight or six by ten.

Q. What did you keep in that storage room?

A. They keep their supplies in there and a few items of advertising material that we pass

out to customers from time to time, as the salesmen call on customers. 1

Q. Where did the Minneapolis office obtain supplies?

A. They requisitioned my office for supplies and we shipped them to them as they needed them.

Q. Did the employees of the Minneapolis office purchase any supplies directly?

A. No, sir.

Q. How about postage stamps?

A. They buy their own postage stamps, if I am correct on that. 2

Q. How about blotters, pencils, and so forth?

A. We furnish all of those things from our office.

Q. Do they have a telephone in this office?

A. Yes, sir.

Q. That appears in the telephone directory under what name?

A. Northwestern States Portland Cement Company.

Q. How is the telephone bill paid? 3

A. The telephone bill is paid from Mason City. The bill is rendered to our Minneapolis office and forwarded to us by our Minneapolis office and paid from our office directly to the telephone company.

Q. Does your company have a bank account in the State of Minnesota?

A. No, sir, not to my knowledge.

Q. Does your Minneapolis office have a petty cash fund?

A. No, sir.

Q. Where does the Minneapolis office obtain its stationery and envelopes?

A. That material is supplied from my office in Mason City. They requisition what they need from time to time.

Q. How are the salaries paid?

A. Our salaries are paid monthly. The checks are drawn in Mason City and forwarded direct to each employee.

Q. Who fixes the salaries that are to be paid employees living in the State of Minnesota?

A. I fix them.

By the Court:

Q. Are they all salaried people then, and not on commission?

By Mr. Maun:

Q. Are any of your Minnesota employees working on a commission basis?

A. No, sir.

Q. How is the rent paid for that office that you have in Minneapolis, Mr. Pray?

A. The rent is paid monthly by check from our office in Mason City.

Q. Who sets the vacation policies?

A. I do, as sales manager.

Q. Is that true as to all Minnesota employees?

A. Yes, sir.

Q. Was that true during the period of 1933 to 1948? 1

A. Yes, sir.

Q. Does the salesman have an automobile?

A. Yes, each salesman has a car, an automobile.

Q. Who owns that car?

A. All cars are owned by the company.

Q. Are the salesmen allowed an expense for operating these automobiles?

A. Yes.

Q. Who purchases new cars for the salesmen when they need one? 2

A. The cars are purchased from our office. There have been times when we have permitted a car to be purchased on the territory, but the quotations would have to be submitted for our approval.

Q. What do you mean by "our office"?

A. I mean my office.

Q. Where?

A. Mason City, Iowa.

(Defendant's Exhibits 4 and 5 were marked for identification.) 3

Q. Mr. Pray, I show you Defendant's Exhibit 4 and I will ask you if you can identify that. If you can do so, will you tell the Court what it is.

A. This form is taken from our order book that is carried by the territory salesman. He makes three copies. The original comes to our office. This copy stays in the book, and this copy

goes to the customer at the time the order is taken.

Q. Is that the type of order form used by your Minnesota salesmen?

A. It is a type that is used, yes, except—yes, it is exactly the same, they all carry the same book.

Mr. Maun: Defendant's Exhibit 4 is offered in evidence.

By Mr. Abdnor:

Q. Mr. Pray, during the time of your service with the company, or during the years to which reference is here made, has any other type of order book been used in Minnesota except this?

A. No, sir, that is the old original form.

Q. That is the only form used?

A. Yes, sir.

Mr. Abdnor: No objection.

By Mr. Maun:

Q. Mr. Pray, showing you Defendant's Exhibit 5, I will ask you to identify it, and if you can do so, tell the Court what it is.

A. This order form is identical with the ones that we used in our order book, except it has been prepared for use by our Minneapolis office in placing the orders with us at Mason City, and it is made this way so that it is carried in the typewriter at the time they make out the order and send it down. It was a form for a telephone order.

Q. Where is this form kept?

A. We send those order forms to the Minneapolis office together with other supplies, and it is kept in the Minneapolis office until they need more. 1

Q. Was this form used during the period 1933 to 1948?

A. Yes, sir.

Mr. Maun: Defendant's Exhibit 5 is offered in evidence.

By Mr. Abdnor:

Q. Mr. Pray, what is the difference between Exhibit 5 and Exhibit 4? 2

A. They are identical, I am pretty sure.

Q. They are the same?

A. Yes, word for word.

Q. Then what was the distinction you say?

A. We put them up in that form because we tear them off of the pad. This salesman form is in book form.

Q. And this is on a pad?

A. That is on a pad with no carbon copies attached. 3

Q. And that is the only difference?

A. That is the only difference.

Q. It is used in the Minneapolis office?

A. That is the only place we use that form.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Now, refer to Defendant's Exhibit 4, Mr. Pray, and will you tell us exactly how that form is used?

A. Well, the salesman, when he picks up the order, he naturally fills in the form, invoiced to such and such a lumber company, their address, Hampden, Iowa, or Minneapolis, Minnesota, the destination, and the date the order is to be shipped. The form provides for either standard Portland cement, plastolith Portland cement, high early strength cement, or Masons cement. The order sometimes consists of all four to be shipped in the same car. The number of barrels is indicated on the order. The order is generally signed and forwarded to Mason City for shipment.

Q. Who signs the order?

A. The customer signs, and the salesman signs it.

Q. Does the customer receive a copy of this form?

A. Yes, he has the yellow copy.

Q. What is done with the original?

A. The original order stays in our office and is filed.

Q. How does it get to your office?

A. It comes by mail.

Q. Will you explain just briefly, without going into detail, what is on the form, how Defendant's Exhibit 5 is used.

A. The order is received by the Minneapolis office and written up on this form for the commodities required, and signed by our Minneapolis office and mailed to Mason City.

Q. Do the salesmen working out of the Minneapolis office take that form with them?

A. No, the salesmen working out of the Minneapolis office use the book. 1

Q. Who in the Minneapolis office uses the form, Exhibit 5?

A. Mrs. Humphrey.

Q. Is that used when she receives telephone orders?

A. That's right.

Q. Does the customer receive a copy of Exhibit 5 when the order is taken?

A. No, sir.

(Defendant's Exhibit 6 was marked for identification.) 2

Q. Mr. Pray, I show you Defendant's Exhibit 6 and ask you if you can identify it. If you can do so, will you tell the Court what it is.

A. Yes, that is a form that we use in tabulating the names of the customers and the orders received at that day, and this tabulation, together with those orders, are mailed to our office daily.

Q. Who prepares this tabulation in Defendant's Exhibit 6? 3

A. Mrs. Humphrey.

Q. Who is this form directed to?

A. This form is directed to me at Mason City, Iowa.

(Defendant's Exhibit 7 was marked for identification.)

Q. Now, Mr. Pray, I show you Defendant's Exhibit 7 and ask you what that is.

1 A. I will have to reverse my identification of this paper. This form here, Exhibit 7, is the form that is made up by Mrs. Humphrey and sent by her, itemizing the orders received.

Q. Just take Exhibit 7 first. What items go on Exhibit 7?

A. Well, the order number and the number of barrels and the customer's name, and the destination and the time of shipment requested.

Q. Where is the information obtained that goes on to Exhibit 7?

2 A. That is obtained by our Minneapolis office when the order comes in.

Q. Does that include these telephone orders?

A. Yes, sir, all orders.

Mr. Maun: Defendant's Exhibit 7 is offered in evidence.

By Mr. Abdnor:

Q. Does Exhibit 7 include on it the orders written up by salesmen who work out of that Minneapolis office?

3 A. There is no salesman working out of the Minneapolis office except Mr. Wilkins and Mr. Yokum.

Q. Well, that is what I mean.

A. Yes, those orders are included.

Q. Does it include on it all those?

A. Yes, sir.

Mr. Abdnor: No objection.

The Court: Received. Is he going to identify 6 later on?

Mr. Maun: Yes, your Honor. 1

Q. Again showing you Defendant's Exhibit 6, will you say what that is, if you can?

A. Exhibit 6 is a form that we use where we list the names of the customers and the destination and number of barrels and so forth, of shipments made on these orders we were talking about on Exhibit 7. All those orders are listed here so that these people know whether or not they have been shipped.

Q. To whom is Exhibit 7, when it is filled out, sent? 2

A. Exhibit 7 is sent to me at Mason City.

Q. Pardon me, I mean Exhibit 6?

A. Exhibit 6?

Q. Who makes it up, and to whom is it sent?

A. It is made up by our chief clerk, Mr. Garlock.

Q. To whom is it sent?

A. To our Minneapolis office.

Q. What is the purpose of sending it?

A. Simply to keep those people informed as to what shipments are being made. 3

Mr. Maun: Defendant's Exhibit 6 is offered in evidence.

By Mr. Abdnor:

Q. Mr. Pray, at the top of Exhibit 6 there is typed "Daily loading record"?

A. That's right.

Q. Is this made up daily?

A. Yes, sir, that is a list of the orders that are shipped.

Q. Each day?

A. Yes, it is made up daily.

Q. It keeps your Minneapolis office informed of the shipments?

A. That is the reason for the report.

Mr. Abdnor: No objection.

By Mr. Maun:

Q. Why is this report made, Mr. Pray?

A. Why is it made?

Q. Yes.

A. It is made to keep our employees in Minneapolis informed as to shipments and orders accepted and shipped.

The Court: Ask him this question, ask him what the company does to notify the buyers that their orders are accepted.

Mr. Maun: I am going to cover that now.

(Defendant's Exhibit 8 was marked for identification.)

The Court: Exhibits 6 and 7 are both received.

By Mr. Maun:

Q. Mr. Pray, I show you Defendant's Exhibit 8 and ask you if you can identify that form, and if you can do so, will you tell us what it is?

A. This is a form that is used in acknowledging receipt of an order. The original of it goes to the buyer, or the customer. There are carbon copies to the salesman.

Q. Out of what office is this form sent?

A. This form is made up and mailed out of the Mason City office.

Q. Is that true in the instance of every order? 1

A. That's right.

Q. Who signs that form?

A. I sign it, as sales manager.

Mr. Maun: Defendant's Exhibit 8 is offered in evidence.

By Mr. Abdnor:

Q. Do you personally sign this?

A. When I am not there, my assistant would sign it, or my chief clerk has authority to sign it in the event I am out of the office.

Q. But if you are in the office you sign all of 2 them?

A. Yes.

Mr. Abdnor: No objection to Exhibit 8.

The Court: Received.

By Mr. Maun:

Q. Mr. Pray, will you tell us generally how orders come into the Mason City plant, if they come in in any other manner than through a salesman?

A. Yes, we receive orders by telephone, by 3 telegram, and by mail.

Q. What type of customers does your company have?

A. We sell our cement to dealers called lumber and building material dealers; those people dealing in building materials, and Ready-mix operators, large contractors such as road builders, block manufacturers, and pipe manufacturers.

Q. Do you sell directly to all types of contractors?

A. No, sir.

Q. From whom would a contractor normally purchase his cement if he wanted your brand of cement, what class of customer, if he wanted your type of cement?

A. I still don't understand it?

Q. To whom would a contractor go to purchase cement?

A. If he is going to build a culvert out here, he would go to some lumber dealer. He would ask that dealer if he handled our brand of cement.

Q. How is your cement shipped to the customer?

A. Our cement is shipped only by car, by rail.

Q. Is it all shipped by rail?

A. Yes, sir.

Q. Do you have any warehouse in the State of Minnesota?

A. No, sir.

By the Court:

Q. Don't you have any truck deliveries in the State of Minnesota?

A. We never load a truck. We have no facilities for loading a truck.

(Defendant's Exhibit 9 was marked for identification.)

By Mr. Maun:

Q. Mr. Pray, I show you Defendant's Exhibit 9 and ask you if you can identify it, and if you can do so, will you tell the Court what it is.

A. Exhibit 9 is what we describe as a loading order. It is a form on which the order is written up in our office when it is received. It is made out in triplicate. 1

Q. What is the purpose of Exhibit 9?

A. The purpose of Exhibit 9 is to enter the order and get it ready for shipment, after it has been properly okayed by the credit department and myself.

Q. What do you mean by that?

A. It has to receive an okay that the customer is financially sound and able to pay for the cement. You put an initial up here if that is true. 2

Q. Is that one of those forms filled out for each order you receive?

A. Yes, sir.

Q. In every instance, is the credit okayed?

A. The credit is always okayed by either the credit manager or his assistant.

Q. Who must that okay be by?

A. Mr. Andersen or Mr. Lehman.

Q. Where are they located?

A. Mason City, Iowa. 3

Q. Does the salesman have any authority to approve credit?

A. No, sir.

Mr. Maun: Defendant's Exhibit 9 is offered in evidence.

Mr. Abdnor: No objections to Exhibit 9.

The Court: Received.

By Mr. Maun:

Q. When an order comes into your place of business at Mason City, Iowa, I take it this is the first paper that is filled out in the office?

A. Just as soon as the necessary information is obtained from that order, the routing, the proper routing, it goes to the stenographer and this slip is made up in triplicate.

Q. What do you do with each of those triplicate copies?

A. As soon as the order is okayed by the credit department and myself, one copy goes out to the mill for shipment. The other goes up to our administrative department for invoicing as soon as we get the car number. This one stays in our file in the sales department.

Q. Then after the car has been loaded, what becomes of this duplicate copy?

A. All copies are returned to my office and are filed.

Q. Are any of these copies sent outside of the State of Iowa?

A. No, sir.

(Defendant's Exhibit 10 was marked for identification.)

Q. Mr. Pray, showing you Defendant's Exhibit 10, I will ask you if you can identify it, and if you can do so, will you tell the Court what it is.

A. This is an acknowledgment form covering various commodities that we not only manufacture but job. We manufacture our own cement,

all types of cement, but we also job white cement, cement plaster, lime and so forth. 1

Q. Is that form used in the regular course of your business?

A. Yes, sir.

Q. For what purpose is it used?

A. Simply to let the customer know that the order has been received and is being shipped.

Q. Is this the first acknowledgment the customer receives of the order?

A. That's right.

Q. Who signs this? 2

A. I sign it as sales manager.

Mr. Maun: Defendant's Exhibit 10 is offered in evidence.

Mr. Abdnor: No objection to Exhibit 10.

The Court: Received.

(Defendant's Exhibit 11 was marked for identification.)

By Mr. Maun:

Q. Mr. Pray, I show you Defendant's Exhibit 11 and ask you if you can identify it? If you can do so, will you tell the Court what it is? 3

A. This is the original invoice that is mailed to the customer out of our Mason City office, giving him the car number and the knowledge that the car has been shipped, and the list of merchandise included in the car.

Q. When is this invoice made out?

A. The invoice is made out the same day the car is shipped.

Q. What happens to the other copies of that invoice?

A. Well, the other copies—in case of it being a line yard, we would send a carbon copy to their local yard out in the country, and the salesman.

Q. What do you mean by a line yard?

A. An organization that has a string of 40 or 50 or 100 lumber yards throughout the country, and their general office, like J. L. Anderson Lumber Company, and of course, business is transmitted through their general office. The outlying yards need a copy of that in order that they may know that the item has been shipped.

Q. This document, Defendant's Exhibit 11, is in five copies, is that right?

A. Yes, I guess it is. I don't have particularly very much to do with this invoicing.

Q. Who handles the invoicing?

A. Mr. Andersen handles this. When we have sold the cement and shipped it, then my duties are practically finished. Mr. Andersen could probably give you more information in connection with these copies than I can.

Q. This is a form that is used in the regular course of business?

A. That is the original form that is used, but where those copies go I am not able to tell you exactly.

The Court: Well, it is 12:00 o'clock. Take a recess until 2:00 o'clock.

Mr. Maun: May I offer this in evidence?

By Mr. Abdnor: 1

Q. With respect to the terms printed on this invoice, have they varied during the years?

A. No, sir, the terms never varied.

Mr. Abdnor: No objection.

The Court: Received.

(November 8, 1954, 2:00 p.m.)

GILBERT BENTON PRAY,

recalled:

DIRECT EXAMINATION. 2

By Mr. Maun:

Q. Mr. Pray, when the cement order is filled at Mason City, where is the cement shipped normally?

A. Where is it shipped from?

Q. No, where is it shipped to?

A. The destination is referred to on the order.

Q. Is that directly to the dealer, or through a warehouse?

A. It goes directly to the dealer from our mill.

Q. I was not quite clear about how salaries 3 are handled insofar as the employees living in Minnesota are concerned.

A. Your question in that regard is simply this. In the hiring of the employees I set the salaries. The fact of the matter is, I have to submit my recommendations to the management, and I receive their okay, and then I refer the matter to the employee again.

Q. Who do you consider to be "the management"?

A. The man I report to was Mr. McDonald. He was assistant to the president, and general manager of our company at the time.

Q. In the case of fixing salaries, you make your recommendation to Mr. McDonald?

A. That's right.

(Defendant's Exhibit 12 was marked for identification.)

Q. Mr. Pray, I show you Defendant's Exhibit 12 and ask you if you can identify it, and if you can do so, will you tell the Court what it is.

A. Well, this is the form of acknowledgment to the customer.

Q. And is that a form regularly used in the normal course of business?

A. Yes.

Q. When is it used?

A. At the time the order is received. This is a form of acknowledgment that is used.

Q. Who fills out the form?

A. The chief clerk.

Q. Where is the chief clerk located?

A. He is located in my office.

Q. Is that at Mason City?

A. Yes, sir.

Q. After that form is filled out, what is done with it then?

A. This form is mailed to the customer direct from Mason City.

Q. This form appears to be a pad of several sheets. What is each sheet for? 1

A. Well, the copies go to the salesmen. If the order develops in the Twin Cities area, a copy of the acknowledgment goes to the Minneapolis office, and of course the original goes to the customer. We have these various copies so that in the case of a line yard operation, there would be two copies for them, one for the general office, and one for the line yard.

Q. Does the main office at Mason City retain a copy? 2

A. Oh, yes.

Mr. Maun: Defendant's Exhibit 12 is offered in evidence.

By Mr. Abdnor:

Q. Who signs these forms in Exhibit 12?

A. Either myself or my chief clerk or my assistant.

Q. Do you always do it when you are there?

A. Not always.

Q. Do you do it most of the time?

A. Most of the time when I am not too busy. It is my duty to do it, but my chief clerk has authority to sign my name. 3

Q. I understand you do it yourself most of the time?

A. Yes.

Q. Would you say that was 90 per cent of the time?

A. Some of the time, yes.

Q. I am trying to find out about how much of the time you sign them yourself?

A. Well, it is not half of the time.

Q. You don't sign half of these?

A. No, there is times when I sign those. They bring in a stack of them that high. I don't sign them all.

Q. But you have two separate forms of acknowledgments?

A. Yes, that form was developed after 1948. This form of acknowledgment here is a change in our form. This is the original form.

Mr. Maun: Well, if that is true I want to withdraw it.

The Witness: That is just to simplify the handling of orders to our office and not clutter up the files.

By Mr. Abdnor:

Q. Do I understand that this form was being used after 1948 instead of the form marked Exhibit 8?

A. That's right. We still use this form too.

Q. Simultaneously?

A. Up to 1948 we used this form.

Q. If the order comes in, do you send both forms?

A. No.

Q. Just one?

A. Just one.

Q. It is always this one, which is Exhibit 12?

A. That's right.

Mr. Abdnor: Instead of that form which used to be Exhibit 8. Well, with the understanding that it is used only after 1948, I have no objection to it. 1

The Court: Received.

(Defendant's Exhibit 13 was marked for identification.)

By Mr. Maun:

Q. Mr. Pray, showing you Defendant's Exhibit 13, I will ask you if you can identify it, and if you can do so, will you tell the Court what it is? 2

A. This is the regular bill of lading that describes the shipment, shows the shipping point and the destination, the commodity that is in the car, and it is made up at the time our invoice is made and goes with the invoice to the dealer from Mason City, Iowa.

Q. Who prepares the bill of lading?

A. Our traffic manager.

Q. Where?

A. In Mason City.

Q. This appears to be in triplicate. To whom do each of the copies go? 3

A. A copy goes to the invoice attached, a copy in our file, and we retain a copy in the department.

Q. Is this for shipment by rail?

A. By rail, that is the only way we ship.

Q. Is that true of all your products?

A. That's right.

Q. Do you ever ship by truck or any other way than by rail?

A. No, sir.

Mr. Maun: Defendant's Exhibit 13 is offered in evidence.

By Mr. Abdnor:

Q. Mr. Pray, is this the only form of bill of lading your company has used in the years here involved?

A. Yes, sir.

Q. You always used this one?

A. As far as I know.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Mr. Pray, who determines the railroad over which your products shall be shipped?

A. Our traffic man, Mr. Wallace, that is his business.

Q. How many railroads are there out of Mason City?

A. I think there is five trunk lines out of Mason City.

(Defendant's Exhibits 14 to 27 inclusive, were marked for identification.)

Q. Mr. Pray, showing you Defendant's Exhibit 14, I will ask you if you can identify that, and if you can, will you tell us what it is?

A. That is a regular form we used in quoting a customer on cement and other products we manufacture.

Q. You say you used that form in quoting the customer on cement. In what instances do you so quote a customer? 1

A. We quote at any time there is a change in the market price, or upon request.

Q. To what customers do you send that exhibit?

A. We send it to the lumber dealer, the building supply dealer, and the Ready-mix operator.

Q. Out of what office is that form sent?

A. These forms are always made up in the office of the Northwestern States Portland Cement Company in Mason City. 2

Q. Do the salesmen carry that form?

A. No, sir.

Q. Was this form used prior to 1948?

A. Yes, sir.

Mr. Maun: Defendant's Exhibit 14 is offered in evidence.

By Mr. Abdnor:

Q. Do I understand you to say that your sales men could not offer a quotation on price? 3

A. That's right. If the salesman wants a quotation he contacts my office, and picks one up from me and gives that to his customer.

Q. He never gives the customer a price?

A. Sure, he can figure out the price himself without a quotation.

Q. Then he can set a price?

A. Yes, he carries a rate book for that purpose. The price of cement is determined by the freight rate plus the package plus the cement.

Q. You didn't mean to imply that the salesmen could not tell the customer how much the cement would cost?

A. Oh no, he is familiar with that. He knows what the price is in every town he works.

Q. And he can tell the customer how much it is?

A. Sure, he has authority to do that.

Q. Under what circumstances is this used?

A. That is a quotation the customer has in his files so if he wants to refer to it he can.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. In what instances would the customer use this quotation?

A. For his record of the price of cement f.o. b. cars in his town.

By Mr. Abdnor:

Q. Why do you want him to have a record?

A. It is our regular practice that he should be acquainted with the price. He has to sell it, and he has to know what his cost is.

By Mr. Maun:

Q. Can he not get the cost from the salesman?

A. He could get it from the salesman if he wants to ask the salesman for it. The salesman can figure it out for him, but the customer always has these quotations in his file.

Q. Do you send him a new quotation every time there is a change in price?

A. Yes. 1

Q. You send every dealer a new quotation?

A. That's right, or on request. If one dealer comes in and wants a quotation, we send it to him.

Q. You said the salesman carries a rate book. What do you mean by that?

A. He has a rate of the tariffs that are published on the freight rate on cement in 100 pounds from Mason City to the destination. He has those listed in his territory, and we make him up what we call a rate book, and that gives him the rate 2 on cement per 100 pounds, and from that he can work out the price.

Q. Is that a freight rate?

A. A freight rate per 100 pounds.

Q. That is from Mason City to the dealer's home town?

A. That's right.

Q. And to that what does the dealer add?

A. He has to add the cost of the package and the f.o.b. cars, Mason City price.

Q. Is the cost of the package the same to 3 all dealers?

A. It varies a little once in a while. It has been the same for many years.

Q. Except for freight?

A. Yes.

Mr. Maun: I do not know whether the Court ruled on Exhibit 14.

Mr. Abdnor: There is no objection to it.

The Court: Received.

By Mr. Maun:

Q. I notice on Exhibit 14 you have two columns. Will you explain what they are?

A. We quoted both ways, f.o.b. cars, Mason City, and we also quoted to the destination price, just for the convenience of the customer, so he will know what the price is, otherwise he would have to go down to the depot and find out what the freight rate is, and add it to the Mason City price which is here, in order to determine what the price is f.o.b. cars, his point. That is simply a matter of convenience to the customer.

Q. Showing you Defendant's Exhibit 15, Mr. Pray, will you look at it and identify it if you can, and tell the Court what it is.

A. Well, this is a form that we use in making up a claim order credit in the event that some cement has been damaged in transit. For instance, if 40 or 50 bags were destroyed in the car on account of rough handling by the carrier, we make out this form and state the conditions exactly on the amount allowed.

Q. Who makes that out?

A. I make it out.

Q. How do you obtain the information?

A. We have a letter from the customer making a complaint as to the loss he had in a particular place.

Q. Does the form have a place for approval?

A. I approve the form and send it to the accounting department and send it to the customer.

Q. Where is that handled? 1

A. That is handled in my office in Mason City.

Q. Is it ever handled in the Minneapolis office?

A. No, they have no authority to make any adjustments of any kind. That is all handled in my department.

Mr. Maun: Exhibit 15 is offered in evidence.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun: 2

Q. After this adjustment has been approved, how is the credit handled?

A. If the account has been paid we send the customer a check, and if not, we give him credit on his account.

Q. When you make a check refund, does it go directly to the customer?

A. That's right, the check is made payable to the customer.

Q. Is it mailed to him?

A. It is mailed to him. 3

Q. How do you obtain information, Mr. Pray, relative to the fact that there has been a damage to a shipmnt to a customer?

A. That information comes to us 90 per cent of the time from the customer, the person who receives the shipment. He generally makes a complaint right away by letter or by telephone.

Q. You say 90 per cent of the time, and the

1 other 10 per cent of the time how is it handled?

A. A salesman might come along and he would tell the salesman about it and the salesman would write my office and tell me about it, but that just happens when the salesman comes along.

Q. Do the salesmen carry any of those forms marked Exhibit 15?

A. No, he has no authority to make any adjustment whatsoever. He just simply relays the information in letter form.

Q. Showing you Defendant's Exhibit 16, can
2 you identify that? If you can, will you tell the Court what it is.

A. This is the form of quotation that we use when we quote on line yards, where there is a whole string of yards, a line organization has 25 points, and we send this to the general office of the line yard, and they want to know what the price is at the various points on the products that we manufacture. This is practically the same as the other quotation, only the points are listed on one sheet for convenience of the customer.

3 Q. Is that the situation where the customer has more than one shipping destination?

A. That's right.

Q. Out of what office is this form sent?

A. That form is made up in my office in Mason City, Iowa.

Q. Are any of these forms made up in the State of Minnesota?

A. Oh no, no.

Mr. Maun: Defendant's Exhibit 16 is offered in evidence. 1

By Mr. Abdnor:

Q. Do you sign these yourself?

A. Yes, sir.

Q. All of them?

A. What do you have reference to?

Q. Exhibit 16, which has just been offered?

A. No, I don't sign them all. The quotations are generally run through our printing press, but sometimes I just sign them. Whenever we make a specific quotation we sign them personally. 2

Q. Then you don't sign these as a matter of practice?

A. No, that's right.

Mr. Abdnor: No objections.

The Court: Received.

By Mr. Maun:

Q. Now, Mr. Pray, showing you Defendant's Exhibit 17, I will ask you to identify it, if you can do so, and tell the Court what it is.

A. This is a quotation on specific work, on work that can be identified, like a barn, or a bank building, or a library or a bridge. It is initially used in quoting for the account of a dealer. 3

Q. What do you mean by that?

A. I mean by that, that the cement is going to go through a dealer, and the dealer informs us as to what price he wants to sell that cement for, and that is the price we quote to the contractor who is figuring this work.

Q. Who is this sent to?

A. That form would be sent to a contractor.

Q. Would the form be sent to someone who is not a customer of yours?

A. Well, no.

Q. Who would the contractor be a customer of?

A. Well, the contractor can buy cement any way he wants to. If he asks for a quotation, we give it to him.

Q. In other words, I take it you would give a quotation to the contractor whether you sold directly to him or not?

A. Oh yes. We don't broadcast these quotations though.

The Court: Is he saying that he gives the quotation of what the contractor can go to the yard and buy it for?

Mr. Maun: He gives the quotation to the contractor.

The Witness: The contractor gets the quotation as authorized by the dealer, and when he gets the job, he buys the cement from that dealer unless he has a better proposition from some other dealer.

By the Court:

Q. You write a letter and tell him what he can go out to George Fullerton's yard and buy the cement for?

A. That is, we send him this quotation. That is on specific work.

The Court: Thank you very much. 1

By Mr. Maun:

Q. Now, Mr. Pray, will you give a concrete and specific example of when that form is used.

A. Call it concrete. You are going to build some culverts out here in the country, say over here by Anoka, adjacent to Anoka, and we have a good dealer here in Anoka, and he wants us to quote certain contractors who are familiar with this work on cement for delivery through his warehouse in Anoka. He gives us a list of contractors who he knows are figuring the work, and we figure this out here, so much per barrel, f.o.b. cars, and so much per barrel f.o.b. dealer's warehouse, and we send this to the contractor—the list of contractors that he has provided, and we quote them. Now, when the job is let, our salesman follows up that contractor as a matter of missionary work to get the order for the dealer, so that we, in turn, can sell the dealer the cement. 2

Q. Your salesmen endeavor to sell the contractors that go to a particular dealer? 3

A. That's right.

Q. Out of what office is this form sent?

A. If the contractor would go to some dealers we are not doing business with, he would buy some other brand of cement.

Q. Where is that form made?

A. That is made up in my office, and no one else handles it.

Mr. Maun: Exhibit 17 is offered in evidence.

By Mr. Abdnor:

Q. Has this form ever come into use because of the missionary the salesman has done?

A. Yes.

Q. It is a fact, is it not, that the salesman's missionary work has created the use of this form?

A. That's right.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Mr. Pray, I show you Defendant's Exhibit 18 and ask you to identify it if you can do so, and tell the Court what it is.

A. This is a contract form that we use in making a contract between ourselves and a customer who buys cement on a direct basis.

Q. What do you mean by a customer who buys cement on a direct basis?

A. On certain work, such as road construction located out in the country, we sell the contractors cement on a direct basis at the same price we sell the dealer. That is a matter of policy with our company.

Q. Where is this contract made up?

A. This contract is always made up in my office.

Q. Who signs the contract on behalf of the company?

A. I sign the contract personally, each one of them, and the buyer signs over here. There is no one authorized to sign that contract except myself, and it carries an original signature in each case.

Q. Your own personal signature?

A. Absolutely. 1

Mr. Maun: Defendant's Exhibit 18 is offered in evidence.

By Mr. Abdnor:

Q. Mr. Pray, these purchasers of the type you have described, contractors, are contacted by your salesmen?

A. Oh, yes, the salesmen call on contractors the same as they do dealers.

Q. If they know the contractor has a highway job they know he will need cement?

A. Yes. 2

Q. Do they carry with them one of these things signed by you?

A. No, absolutely not. The salesman never has these contracts in his portfolio, signed or unsigned. The salesman's job is to sell the cement, and he sends the order in on our regular order form.

Q. But after that comes in you make up this form?

A. We make up that form in my office and send it to the contractor direct for signature. 3

Q. You never send it to the salesmen to take it to the contractor?

A. No. I have gone out myself and closed a deal after a job has been sold, and I have been on the job myself.

Q. Would you sell to a contractor without this?

A. Sure. He doesn't have to make a contract.

That is for his own protection. It is no protection to us.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Showing you Defendant's Exhibit 17, Mr. Pray, do the salesmen in Minnesota carry any copies of that form?

A. Oh no.

Q. Mr. Pray, I show you Defendant's Exhibit 19 and ask you to identify it if you can do so, and tell the Court what it is.

A. When we get a contract, say for ten miles of paving, and it is going to take 40,000 or 50,000 barrels of cement, we make up what we call a contract record for our shipping record. That is a record of it. On this copy is a place over in here for tabulating the shipments that are made.

By Mr. Abdnor:

Q. Will you repeat that, sir, I didn't understand.

A. This is a record of the shipments that are made against a specific contract. This carries the date, the load order number, the date loaded, the number of barrels in each car of cement. The total amount of the contract is listed on the card, and we ship against that until we have completed the contract, and then we go to that form. This is simply an office record kept for our own convenience to know what we are doing.

By Mr. Maun: 1

Q. When you said "that form" you meant Defendant's Exhibit 18?

A. That's right.

Q. Where is this record, Defendant's Exhibit 19, kept?

A. This is kept in my office and the office of the chief clerk, who handles the detail work in connection with this record.

Q. Is that in Mason City?

A. That is in Mason City.

Q. Is any record kept anywhere in the State 2 of Minnesota?

A. No, sir.

Mr. Maun: Defendant's Exhibit 19 is offered in evidence.

Mr. Abdnor: If the Court please, I have made no objection to many exhibits because I don't want to impede this thing at all, but frankly I object to this on the ground it is immaterial. I think it simply complicates the record.

The Court: Well, it is part of their regular way 3 of doing business, a record kept of the amount of goods shipped to the individual.

Mr. Maun: That's right, your Honor.

The Court: Well, I think I will receive it. It may clog up the record a little, I don't know.

By Mr. Maun:

Q. Mr. Pray, I show you Defendant's Exhibit 20 and ask you if you can identify it, and if you can do so, will you tell the Court what it is.

A. Let me see that exhibit. This contract form is practically the same—Exhibit 20 is practically the same as Exhibit No. 18, except that it is a contract between three people, the dealer, the contractor, and the Northwestern States Portland Cement Company. It is a contract made covering the specific amount of cement for specific work. It is signed by the dealer, who is the seller, and the contractor, who is the buyer. A copy is mailed, after the signatures are secured, the copies of the contract are mailed to the dealer and the contractor and we retain one copy in our file.

Q. Who signs it on behalf of the Northwestern States Portland Cement Company?

A. I sign all those contracts personally.

Q. Are any of these forms kept in the State of Minnesota?

A. No, sir.

Mr. Maun: Defendant's Exhibit 20 is offered.

By Mr. Abdnor:

Q. On your last statement you said that none of these contracts, or copies of this form, are kept in Minnesota?

A. Yes.

Q. Of course, one of them might be sent direct to a purchaser in Minnesota?

A. I don't think so.

Q. If a dealer was in Minnesota, then it would be kept in Minnesota?

A. If the dealer was in Minnesota he would have a copy of it, of course.

Q. Yes, I wanted to clear that up. You said this was similar to Exhibit 18? 1

A. The terms and conditions are the same.

Q. Is it used about the same way?

A. Yes. The only difference is that the price is different, of course, in that it is a dealer price instead of the manufacturer's price.

Q. Who do you look to for payment under a contract of this kind?

A. We sell it to the dealer. The contractor pays the dealer.

Q. This type of thing again arises by virtue of the salesman calling on the dealer, this sort of thing like the contract marked Exhibit 18 arises by virtue of the salesman's work with the dealer and the contractor? 2

A. That's right.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Now, Mr. Pray, showing you Defendant's Exhibit 21, I will ask you if you can identify it and tell the Court what it is. 3

A. Exhibit 21 is a report identified as the salesman's daily town report. This report is made out by the salesman at the end of each day, and details the names of people he called on, whether they are dealers, contractors, Ready-mix operators or block manufacturers, whoever they are. They are listed on this form, and on the back he gives us a little resume of his conversation with

these people. He fills in these forms in connection with the location of the warehouse or railroad, and other information details that we require.

Q. Is this a form which each salesman in Minnesota makes daily to the company in Mason City?

A. All salesmen in Minnesota, as well as the other states, are required to make that report and mail it to my office.

Q. Do any of your Minnesota salesmen make a report to the Minneapolis office?

A. No, these reports all come to Mason City.

Mr. Maun: Exhibit 21 is offered in evidence.

Mr. Abdnor: No objection to Exhibit 21.

The Court: Received.

By Mr. Maun:

Q. Showing you Defendant's Exhibit 22, Mr. Pray, can you identify that and tell the Court what it is.

A. Exhibit 22 is a form that we use for the daily reports of Mr. Yokum in our Minneapolis office. It gives us a resume here of the people he calls on each day, so we know what he is doing and the people he is contacting. This report is mailed to my office daily. We get them one day for the previous day's work.

Q. Does Mr. Wilkins make a report of that kind?

A. Yes, Mr. Wilkins makes a report on a different form.

Q. Does Mr. Wilkins make a report such as Exhibit 21?

A. He is not required to make a report on this. 1

Q. Who does make a report on Exhibit 21?

A. This report is made by what we call territory salesmen, the men who travel the road. This report is strictly a Minneapolis office detail.

Q. You are referring to Exhibit 22?

A. Exhibit 22, that's right.

Mr. Maun: Exhibit 22 is offered in evidence.

By Mr. Abdnor:

Q. Do any salesmen in your entire system other than Wilkins and Yokum use this form? 2

A. What was your question?

Q. Do any men in your entire system use this form except these two Minneapolis men you named?

A. That is all.

Q. Just those two in your entire system?

A. That's right.

Mr. Abdnor: No objection.

By Mr. Maun:

Q. In what states does your company ship its cement? To what states does your company ship its cement? 3

A. We ship in Iowa, Minnesota, North Dakota, South Dakota, a small part of Nebraska, and the northeastern part of Wisconsin.

Mr. Maun: Exhibit 22 is offered.

Mr. Abdnor: There is no objection.

The Court: Received.

By Mr. Maun:

Q. Showing you Exhibit 23, Mr. Pray, can you tell us what that is?

A. Exhibit 23 is what we call the initial yearly town report. Only one is made out each year at the time the salesman makes his first call on the dealer. It is a detailed report, giving us the names of all dealers, cement operators, block manufacturers, anybody else that buys cement, whether we sell them or not. It is a record of who there is in this specific town that is in the cement business.

Q. What employees of yours make up that report?

A. All salesmen, all territory salesmen, including Mr. Wilkins of our Minneapolis office. He has to make this report out for every dealer in the Twin Cities area.

Q. Does a copy of this go to the Minneapolis office?

A. No, the original is made up and mailed into my office, the same as the territory men mail theirs to my office.

Q. Where are the originals retained?

A. In what we describe as our town file.

Q. Is that in Mason City, Iowa?

A. That's right.

Mr. Maun: Exhibit 23 is offered in evidence.

By Mr. Abdnor:

Q. What use do you make of these after you have them?

A. That is a source of information we have in

the event we get a telephone call from a certain point up here in the woods, and we are not familiar with the situation, we grab the file and turn it up here and we say "Well, this fellow is a trucker, he is not in the cement business and he is not entitled to buy from us." We know right off the bat. It is a matter of specific information for my guidance, so I won't get my wires crossed in transacting our business. 1

Q. Do you ever use this to see who might be buying cement in the town and who is not?

A. Oh, sure, prospective customers. 2

Q. Is this one way to keep your salesmen alert?

A. Sure, we have certain towns where we don't sell any cement. We have to make out this report just the same.

Q. That would include prospective customers?

A. Yes.

Q. The salesmen keep trying, and this is his job?

A. Sure. 3

Mr. Maun: Exhibit 23 is offered.

Mr. Abdnor: There is no objection.

The Court: Received.

Q. Who is supposed to make this out, Mr. Pray?

A. The salesman on the territory, as well as the Minneapolis office.

Q. How is this different from any other?

A. It is different from the other because this form provides for a list of all people in the town that are in the cement business. If there are five lumber dealers, maybe we only sell one, but this report covers them all. That is a source of information for my office, as a sort of guide.

By Mr. Maun:

Q. Showing you Defendant's Exhibit 24, Mr. Pray, can you identify it, and if you can do so, will you tell the Court what it is.

A. Exhibit 24 is what we call a weekly route sheet, or itinerary. Generally, the salesmen make up a tentative report of where he expects to be during the next week, and he sends that in on Saturday so we have it on Monday morning and we will know where he is going to travel during the week. He is supposed to make these towns and set down each one here, and in the event he doesn't, he is supposed to notify the office.

Q. If he doesn't make those towns, what office does he report to?

A. To my office.

Q. What salesmen make that report?

A. All the territory salesmen, outside salesmen, the people that travel the territory.

Q. Do Minneapolis salesmen make that report?

A. No, they don't. They are right in the Twin Cities and we can put our finger on them by telephone in an hour or so. We may want to get hold of this salesman and we know where he is going to be on Tuesday—well, here it is.

Mr. Maun: Exhibit 24 is offered in evidence. 1

By Mr. Abdnor:

Q. Do I understand you to say you don't use this in the Twin Cities because you are able to locate your salesmen here?

A. Yes, they are not outside the Twin Cities, they just work in Minneapolis and St. Paul.

Q. You can locate them by telephone?

A. If we want to get them on the telephone we naturally call the girl in the Minneapolis office, and if he happens to be out she will know where he is. 2

Mr. Abdnor: No objection.

The Court: Received.

The Witness: We don't use that form in the Minneapolis office. It would be just a duplication of effort.

By Mr. Maun:

Q. Showing you Defendant's Exhibit 25, Mr. Pray, will you identify that, and if you can do so, will you tell us what it is.

A. This is a daily report of towns visited, and has reference specifically to your Exhibit 24 in that it lists the towns that the salesman calls on today and comes in daily, so we know that he has made those towns. He states down below here where he expects to be tomorrow and the day after tomorrow, and a place provided here for any change in his mail address. We require this form so that in the event he changes his mind and is not going to make the town listed on the original 3

1 itinerary, then we know he is going to go to so-and-so. We may make a note that he will be back on the route next day.

Q. What salesmen make up Exhibit 25?

A. There is only three of them that make this up, Mr. Youngstrom, Mr. Sig, and Mr. Meyer.

Q. Do the salesmen working the Twin Cities territory use this form?

A. No, sir.

Mr. Maun: Exhibit 25 is offered in evidence.

Mr. Abdnor: No objection.

2 The Court: Received.

By Mr. Maun:

Q. Are the territory salesmen required to report on forms 23, 24 and 25 as part of their duties?

A. Oh, yes, that is absolutely—they all have specific instructions. This is the one thing that they must do, and it must be correct and specific in every case.

Q. Where do the salesmen obtain these forms?

3 A. Those forms come to my office, they are mailed to the salesmen when he is ready to start out, or he picks them up when he is in for the annual sales meeting, and if he runs out later he requisitions our office for an additional supply. When I say "our office" I mean my office.

Q. Does the Minneapolis office carry any of these?

A. They don't carry any of that kind whatever.

Q. To whom do the territory salesmen in Minnesota report? 1

A. They all report to my office at Mason City.

Q. Do any of them report to anyone in Minneapolis?

A. No, sir, they don't.

Q. To whom do the Minneapolis salesmen report?

A. The Minneapolis salesmen report to me at Mason City.

Q. Showing you Defendant's Exhibit 26, Mr. Pray, I will ask you if you can identify it. 2

A. This Exhibit 26 is simply a requisition form that is sent to us by our salesmen when they want to provide certain pieces of advertising material and have them shipped direct to our dealer or our customer. Sometimes the customer may be a contractor. It lists all the items of material that we have here, including pamphlets of all kinds, blotters, pencils, time books, which we furnish gratis, and that is made out by the salesmen in all territories, including the Minneapolis office, and mailed to my office. 3.

Q. Both the Minneapolis salesmen and the territory men use the same form?

A. Just exactly the same.

Q. Does the territory man send it to you or to the Minneapolis office?

A. They send it to me, the Minneapolis office has none of those supplies on hand for reshipment.

Mr. Maun: Exhibit 26 is offered in evidence.

By Mr. Abdnor:

Q. Just to clear up a point you mentioned, I think you said these things were gratis.

A. Yes, sir, we give the letterheads, envelopes, everything on there. There is no charge for that.

Q. In other words, if a contractor wants 1000 letterheads with his name on them?

A. You bet, we have a little printing press down there in our office.

Q. Do you put your name on the letterheads too?

A. No, sir, we don't mention our name or our product.

Q. What does "Number 3 house" mean?

A. That is just a picture of a house on there that goes to a dealer. These letterheads are made up by an artist. It will have farm buildings or a bridge or a piece of paving or something like that.

Q. And you furnish those to dealers and buyers without charge?

A. Yes, we can show you exhibits on that if you want to see. We send them 1000 letterheads and 1000 envelopes.

Q. You give them enough to transact all their business?

A. That is a part of our service to our customers. When they run out they can re-order.

Mr. Abdnor: No objection.

The Court: Received.

By Mr. Maun:

Q. Are all these supplies shipped out of the Mason City office?

A. Yes, we maintain a stock in Mason City, and the shipment originates there direct to the customer.

Q. Who is Mr. Wilkins?

A. Mr. Wilkins is our representative in Minneapolis and St. Paul.

Q. What are his duties?

A. His duties are to call on the customers in Minneapolis, particularly the headquarter offices of the line yard we have been talking about, but he also calls on the regular dealers in the Twin Cities such as Minneapolis Builders Supply, and St. Paul Builders Supply, and those kind of people.

Q. Is it necessary for an order to come through your salesmen in order for you to accept it?

A. No, it doesn't have to come through a salesmen. Any dealer can call us direct. Is that what you meant?

Q. Yes.

A. Yes, any dealer can call us direct and order cement.

Q. About how many times a year do your territory salesmen call on your dealers?

A. They aim to call about every three weeks, starting in March, and they wind up about the

first of November. During the winter months we don't travel.

Q. In case an order comes in from a new customer, how is that handled?

A. A new customer?

Q. Yes.

A. When we receive an order from a new customer, the first thing we do is check his credit with our credit department. We check to see if he is what we describe as a qualified dealer. He has got to qualify as a dealer. He has to be in the lumber business, wholesale building materials, or handling of building materials, or he cannot qualify. In other words, a truck driver cannot buy cement if he sent in an order.

Q. Would you refuse to sell to a truck driver if he sent in an order?

A. Yes, sir.

Q. How do you determine the date upon which a load of cement can be sent to a particular customer?

A. The date?

Q. Yes.

A. When we receive the order?

Q. No, how do you determine when the shipment is going to be made?

A. Well, when the dealer sends in an order, or the salesman, he generally specifies the date that he wants it shipped. As a rule we are able to meet that request and ship the car on the date requested. If we happen to be three or four

days behind on shipments, we notify the dealer immediately and inform him that we are three or four days behind on shipments on account of a breakdown, or a demand that is beyond the supply, and when we will ship. 1

Q. In what office is the date of shipment determined?

A. In our office in Mason City.

Q. Do any of your salesmen traveling in Minnesota determine the date of shipment?

A. Oh no, no. All they do is follow the instructions of the dealer and try to get it for him when he wants it. 2

Q. What are the duties of Mr. Yokum?

A. Mr. Yokum is simply a salesman in the Twin Cities area. He calls on a different class of people than Mr. Wilkins does. He calls on block manufacturers and contractors, and some dealers, but he does not make these line yard calls.

Q. What are the duties of Mr. Meyer?

A. He is a territory salesman. 3

Q. Out of what city does he work?

A. He lives in Minneapolis and he travels north. His territory will start, say at Anoka and Elk River, and further north. He goes up as far as Alexandria and St. Cloud and Little Falls.

The Court: Take a five minute recess.

(Recess.)

By Mr. Maun:

Q. Mr. Pray, showing you Defendant's Ex-

hibit 22, who is it you said makes out that report?

A. The men that travel the Twin Cities territory, Mr. Wilkins and Mr. Yokum.

Q. Why is it their report is different than the others in the territory?

A. The other reports that we maintain, the other reports on our town file down there is a matter of record, and these reports are just a matter of reporting to me to know how these boys are working and who they are calling upon.

Q. Do the men working out of the Minneapolis office call on dealers other than St. Paul and Minneapolis?

A. No, they don't, just the Twin Cities area.

Q. Calling your attention to Exhibit 12, that is the one you said was used after 1948?

A. That's right.

Q. As to all other forms to which you have testified, were they used from 1933 to 1948?

A. That's right.

Q. All except this one?

A. Yes, this being used at the present time.

Q. Who is in charge of the Minneapolis office?

A. I am directly in charge of the Minneapolis office.

Mr. Maun: No further questions.

CROSS EXAMINATION.

By Mr. Abdnor:

Q. Mr. Pray, I take it from what you said that the cement business is a competitive business?

A. Absolutely.

Q. And that it is competitive in the sense that there are other people selling cement in Minnesota besides your company?

A. I found that out, yes.

Q. Who are your principal competitors?

A. Universal Atlas, Dewey, Penndixie, Hawkeye, Lehigh. Those are the principal ones, and Huron if you want another one.

Q. Throughout your testimony we have heard a bit about freight rates.

A. Yes, sir.

Q. I understand that freight rates play a large part in the competitive picture concerning cement?

A. That's right.

Q. Is that because of the inherent weight connected with cement?

A. Yes.

Q. Do you have a representative in the Duluth area?

A. No, sir.

Q. Why not?

A. Because we don't ship cement up in the Duluth area. Universal Atlas is up there. We cannot ship up there because it would be prohibitive.

Q. Because of the freight rate?

A. Yes.

Q. You cannot compete in the Duluth area with a cement manufacturer up there?

A. That's right, any more than they could compete down in Austin, Minnesota.

Q. You have traveled, I take it, from Mason City to the Twin Cities on a good many occasions?

A. Yes.

Q. You know approximately how far it is from Mason City to the Minnesota line?

A. Yes, about 45 miles, I would say 40 miles.

Q. Would that mean then, that the southern Minnesota territory, from what you have just said, is a natural territory for the company you represent?

A. That's right.

Q. Because of the proximity to the cement plant?

A. Rates are favorable.

Q. I take it that you are pretty familiar with how other companies are situated with respect to their location and trade areas?

A. Yes.

Q. It is a fact, is it not, that there is no competition any closer to the Twin Cities than your plant?

A. There are two plants in Mason City. Lehigh has a plant there too.

Q. With respect to the Twin Cities, I under-

stand that this is a favorable trade area right here because you are as near, you and Lehigh, as any other plant? 1

A. We have the most favorable rate, yes.

Q. And that is an advantage in selling?

A. Yes.

Q. As a result, you make a very substantial number of sales in Minnesota?

A. We do.

Q. Now, these salesmen that you have here, you have told us that they call on the trade and they call upon the trade regularly? 2

A. Yes, they do.

Q. They also call on the retail purchasers to encourage those purchasers to buy from companies who sell your product?

A. Well, in the event of specific jobs. We don't contact house owners or anything like that. If they want to build a school house, we naturally go to the owners and the architect and contractors who we feel might be able to get the job, and those are the people we contact.

Q. What do your salesmen have in your favor when it comes to selling your concrete or cement as against other people's? 3

A. We have a very high grade product which we are very proud of, and we have one advantage over our competitors which is kind of hard for them to swallow, in that our cement makes a real light colored concrete. That is a selling point in our business. That is about all we have to offer.

We cannot make any stronger concrete than our competitors, although we will go up against any of them from the standpoint of quality.

Q. Do your salesmen urge these points when they are talking to lumber yards, dealers, and contractors?

A. Sure.

Q. Their job is to sell your cement as against others?

A. That's right.

Q. I would like to make a bit of inquiry with respect to the exhibit that listed certain advertising material. You said in your testimony that there was a room in the Minneapolis office, which, among other things, contained advertising material. Does that room hold advertising favors and that sort of thing that are used by your salesmen for Minneapolis?

A. The Minneapolis office requisitions us for what they need in the way of advertising material, but that, you understand, does not include letterheads or envelopes, but it includes blotters, lead pencils and pads, similar to this, that we put out with our name on it. Three or four items that we send up to them at regular intervals, maybe twice a month we send them a supply. They have that in their store room. When Mr. Wilkins and Mr. Yokum go out to call on the trade they will take along a bundle of those and they will take along a bundle of pads and three or four pencils and lay them on the desk as a token of good will.

Q. Those items have your name on them to be a reminder to the cement customer that your company has been good enough to furnish them with those items? 1

A. Yes, that's right.

Q. I notice there were pamphlets put out by your company with respect to various types of cement uses?

A. We don't produce the pamphlets. Our pamphlets are produced by the Portland Cement Association and we purchase the pamphlets from the Portland Cement Association and we pass them out to anybody that asks for them. We don't send them out in quantities, because they are expensive. 2

Q. Do your salesmen have those?

A. All they carry is a portfolio with a sample of what we have to offer, and if a man wants a pamphlet on concrete around the farm, we will send him half a dozen of those if he wants them, but we wouldn't send him two or three hundred.

Q. Because of the cost? 3

A. Yes, sir.

Q. I notice in the returns that were presented here this morning, State's Exhibits A through P, that there was allowed as a deduction from gross income on those returns, a certain advertising expense, part of which was designated as calendar expense. Does your company put out calendars?

A. No, we only put out one calendar as our annual calendar.

Q. That is what I mean?

A. Yes, we print a calendar and send one out to each dealer, each contractor and architect all over the country.

Q. In your trade territory?

A. Yes.

Q. And that includes Minnesota?

A. Yes, we don't send a customer two or three hundred, we send one that he can hang on the wall.

Q. Which has your name on it?

A. That's right.

Q. And the purpose of that is to create good will for your company and encourage the use of your product?

A. That's right.

Q. Are any of those sent to your salesmen for distribution?

A. They carry a few of them in the car. We generally send the salesman 25 of those calendars, and he goes out here where they are building a school house and the contractor has a temporary office, and he generally hangs one up in there, or for some reason the dealer's calendar has been destroyed, and he would be able to replace it. We distribute those by mail from Mason City. Those are all mailed out of Mason City at one time, along about the 15th or 20th of December. We have a job down there mailing out the calendars. There is about 7000 of them each year.

Q. I understand you pay the expenses of your salesmen up here?

A. Yes, sir. 1

Q. You pay their room when they are away from home?

A. Yes, sir.

Q. And their meals?

A. Yes, sir.

Q. And their car expense?

A. That's right.

Q. All of that is paid on vouchers submitted by your salesmen?

A. They submit an itemized statement of their expenses for the week. We get it in the Monday morning mail. I have to okay those expenses and they go up to the administrative department and the check is mailed direct to the salesmen. 2

Q. He is reimbursed for all such expenses?

A. He is.

Q. Do these salesmen incur any expenses in entertaining any prospective customers?

A. Entertaining, but it is not excessive.

Q. That is an accepted practice, is it not?

A. That is a small item of their expense.

Q. But they are reimbursed for whatever entertaining they do? 3

A. Yes, anything that is legitimate.

Q. Do they make any gifts at Christmas time and at birthdays?

A. No, they send out a Christmas card at Christmas time to their good friends and customers.

Q. Do you pay for that card from Mason City?

1 A. Yes, sir.

Q. Is that printed with the salesman's name?

A. Strictly a personal matter between the salesman and the customers.

Q. But he is reimbursed for that cost?

A. Yes, sir.

Q. Now, with respect to roads, streets, and highways, I take it that that is one of the major users of concrete products, the state and the municipalities with their streets and highways?

A. Well, you mean they buy cement direct?

2 Q. No, they use cement, do they not?

A. Oh, sure.

Q. There is quite a substantial amount of cement used for highways and streets?

A. Oh, yes.

Q. With respect to highway building in the State of Minnesota since 1939, you do not sell directly to the state, do you?

A. No.

Q. You sell to contractors?

A. Yes.

3 Q. How are contracts made with contractors to encourage them to buy cement from your company?

A. Well, the only thing we have to offer is our produet, and possibly a friendly relationship with the contractor.

Q. Built up through good will?

A. That is all. We have lots of friends around among these contractors, and we don't sell them all, all the time but we get our percentage.

Q. That is the job of your salesmen? 1

A. That's right, they build up good will with that fellow. Many a time we have been told "You are not in the picture this time, but the next time we get a job we will give you consideration."

Q. He is a pretty important man?

A. Yes, he is.

Q. Do you do some good will entertaining?

A. We do very little entertaining. We don't have to do that.

Q. A salesman or agent is able to sell without too much of that sort of thing? 2

A. Well, the contractors don't expect it. That used to be a matter of necessity in years gone by, that you had to go out and play ball.

Q. How many years ago was that?

A. Oh, 25 or 30 years ago.

Q. Would it have been true since 1933 in Minnesota?

A. Very little.

Q. I notice that you have an order form which has been put in evidence—I am sure you are familiar with it—that has a space for the signature of the customer. 3

A. Yes.

Q. Would you ship cement if he didn't sign that form?

A. Yes, sir.

Q. That is not required that he sign that?

A. No, sir.

Q. So if your salesman forwards an order, it

1 is not necessary to have the customer's signature on it?

A. No. We have salesmen who make it their particular business to get that signature. Other salesmen haven't got what it takes.

Q. You prefer to have that signature?

A. Sure, that completes the transaction, but it is not necessary. We do not require it.

Q. I think you testified with respect to this Exhibit 8, which is an acknowledgment of an order, that you send your customer a copy and one
2 to your salesman?

A. Yes, sir.

Q. Why?

A. So that he will know that the order has been received and is being shipped.

Q. Of what use is that information to him?

A. He keeps the record of his shipments so he knows what he is doing. It is the only source of information he has.

Q. Is it important that he know that it is shipped?

3 A. Oh, sure. He records that in his book. He has his record, he has a little book. He knows what he is shipping all the time.

Q. Of what use is that to him?

A. That he is a successful salesman.

Q. Well, he sent the order down to you?

A. He has got to know whether we ship it or not. It isn't worth a damn unless we ship it—oh, pardon me, unless we ship it and we get the money for it.

Q. So his responsibility doesn't end when he mails you the order? 1

A. Absolutely not.

Q. His responsibility goes beyond mailing you that piece of paper?

A. Sure.

Q. I think you said that a list of orders taken was sent in to your company? Is that right? Wasn't there one such exhibit?

A. A list of orders. Well, yes, all the orders that come to our Minneapolis office are listed on a sheet and sent down to us with a confirmation 2 of the order on the regular order form.

Q. I think you said that the lady in the office made out that sheet?

A. That's right.

Q. So in order to make up that sheet, she knows what orders have been taken by your salesmen?

A. Oh, no, she doesn't know what the salesmen are doing, just those in the Minneapolis office.

Q. I mean, Mr. Yokum and Mr. Wilkins. 3

A. That's right.

Q. They submit these—well, what do they give her to enable her to make up that listing?

A. They might give her just a memorandum like this, "Ship a car of bulk tomorrow." She makes up the order and tabulates it.

Q. That is a daily listing sheet?

A. Sure.

1 Q. How about the orders they have taken on the order form?

A. That just eliminates the necessity for her to make a copy of it, but she lists it just the same.

Q. Do they give her a copy?

A. Sure.

Q. Do they report in to this office every day for that purpose?

A. Oh, yes, they are in there and out of there all the time.

Q. Who occupies the desks?

2 A. Mr. Wilkins and Mr. Yokum and Mrs. Humphrey.

Q. Does Mr. Wilkins have a telephone by his desk?

A. Yes.

Q. That is available to talk to customers or call in?

A. Yes, sir, over one line. It is just an extension, you understand. There is just one line into our office with an extension to these other desks.

3 Q. Are you sure about that one line?

A. Yes, sir.

Q. There is only one line into your office?

A. I beg your pardon. I am corrected. My girl in the office says there are two lines. I am mistaken.

Q. That is something you didn't know about?

A. That's right, I just assumed there was one line in there, but I am corrected. I can tell you

how many lines we have in Mason City, but I don't know about up here. 1

Q. You would expect Wilkins to know that?

A. Yes, he can answer that question.

Q. That is part of his job?

A. Yes, sure. He would know how to answer that question.

Q. Mr. Pray, I hand you Exhibit 15, which has been described, I believe, as a claim for credit in the event of damage in transit?

A. Yes.

Q. I think you answered this to the effect that about 90 per cent of the time that comes direct to you from the customer? 2

A. That's right.

Q. And the rest of the time the salesmen forward it to you?

A. Well, the salesman might run into it, and when he does, of course, he would report it by letter, that so-and-so had 25 bags of cement broken in the last car and wants to know what you are going to do about it.

Q. I think that in response to inquiries, you said that your territory salesmen, whom I take to mean salesmen outside of the Twin Cities, call on their customers about once every three weeks? 3

A. That's right, it will average out about that way.

Q. Is the same situation true with respect to the Twin Cities men?

A. No.

1 Q. How often do they call on their customers?

A. They call on them much more often, because the turnover is much faster, there is more going on, more jobs in the making, and it is necessary to see those fellows more often. In the Twin Cities they buy 50 cars of cement when this fellow outside in some small town will buy one car a month. You have to keep after them all the time.

Q. Do they call on them more often than once every three weeks?

2 A. Oh, yes, they turn it over as fast as they can make it.

Q. I think you said you were with the company since 1929?

A. That's right.

Q. They have had this office in Minneapolis ever since that time?

A. Yes.

Q. They had it some time before that?

A. Yes, they had offices there when I came.

Q. In 1929?

3 A. Yes, sir.

Q. But you wouldn't know how far behind that?

A. I don't know. Quite a while. You can get that information from some of the other boys that are older than I am.

Q. Handing you Exhibit 11, Mr. Pray, did I understand that you say that has been used without change during the years we have involved here?

A. To my knowledge this is the same form we have always used. 1

Q. What do these words "Price f.o.b. destination" mean?

A. That means that is the price f.o.b. cars at point of delivery. It includes the freight and the package.

Q. And that is the way you sell?

A. That is the way we invoice it. We prepay the freight.

Q. You prepay the freight but send it f.o.b. the point of delivery? 2

A. That's right.

Q. I said point of delivery, I meant f.o.b. destination.

A. That's right.

Q. Mr. Pray, I notice again from State's Exhibits A through P, being these income tax returns that were made up by Mr. Burkman in his office, that there was a deduction allowed there for contributions made to the Minneapolis Community Chest. Are you familiar with those contributions? 3

A. No, sir, I know nothing about it.

Q. You don't know whether or not such contributions were made?

A. No, sir, I didn't have charge of that department, I don't know anything about it.

Q. Do you know whether or not there is a sign on the door of the office in Minneapolis?

A. Yes, I think our name is printed on the door.

Q. It is also a fact, or do you know, that the name is listed on the lobby directory in that building?

A. Well, I don't know, but I presume it is. I am pretty sure it is. That would be natural.

Q. With respect to the men that you described earlier as being salesmen of your company who live here in Minneapolis, do you know how long they have lived here? For example, Mr. Wilkins?

A. Sure, Joe Meyer has lived in Minneapolis, I would say, better than 30 years.

Q. So far as you know he has been a resident?

A. Yes.

Q. How about Mr. Wilkins?

A. Mr. Wilkins was born here in Minneapolis and he has lived here for many years. He had a job at one time with an outfit that made plaster down at Ft. Dodge prior to the time he went to work for us. I am not familiar with his activities prior to the time he went to work for us, except that he told me about his job prior to the time he made application to me for a job. Then he moved back to Minneapolis.

Q. Some years ago he moved back to Minneapolis for your company?

A. Oh, yes, ten or twelve years ago.

Q. How about Mr. Sig?

A. Sig has lived in Willmar, Minnesota, for a good many years, probably 30 or 35 years.

Q. How about the other man?

A. Mr. Youngstrom has lived in Faribault, Minnesota, for about 15 years. Prior to that time we had him in Iowa. Mr. Yokum has lived here all his life. 1

Q. So far as you know, the lady who works in the office is a resident of Minnesota too?

A. She is at the present time. I don't know how far back. All I know is when she went to work she lived in Minneapolis.

Mr. Abdnor: Thank you, Mr. Pray, I think that is all.

2

RE-DIRECT EXAMINATION.

By Mr. Maun:

Q. Does your company keep any inventories in the State of Minnesota?

A. No.

Q. Did they at any time between the year 1933 and 1948?

A. No.

Q. Now, with reference to Exhibit 15, which was the adjustment form, or complaint, do you remember that form? 3

A. Yes, sir.

Q. Do your salesmen in Minnesota carry a copy of that form or any supply of them?

A. No, sir, those forms are strictly handled in my office and made up in my office and completed and signed by nobody else but me.

Q. When a salesman sends information as to a customer's complaint, how does he send it in?

4

A. He just sends it on his regular correspondence paper, he writes a letter to that effect, informing us of the trouble that he ran into and wanting to know what we are going to do about it, and please advise the customer, which we do. We clear those matters up quick, very promptly.

Q. When an order is placed on your regular order form, which is Defendant's Exhibit 4—

A. Yes.

Q. You made the statement that that completes the transaction. What did you mean by that statement?

A. That is the complete transaction as far as the order is concerned.

Q. What do you mean?

A. That order comes in to us, and of course it is not completed until we have accepted it. That order has to be accepted two ways, by our credit department and by myself.

Q. Is this the accepted order, or after the customer executes or signs—what is Defendant's Exhibit 4?

A. I didn't get that question.

Q. Is the order accepted or approved before or after the customer signs it?

A. After.

Q. After the customer signs this order form?

A. That order is approved when it reaches our office.

Q. Are these orders ever approved in advance of the customer giving an order?

A. No. 1

Q. Now, Mr. Pray, I didn't quite understand your statement relative to prepaid freight in answer to Mr. Abdnor's question. Showing you Defendant's Exhibit 14, what exactly happens in this instance?

A. This is a quotation for bulk cement, in paper, or f.o.b. cars, Mason City, and f.o.b. destination.

Q. Why is that column, f.o.b. destination, included on that form?

A. Well, the dealer wants to know what the 2 price of the cement is at his destination.

Q. What is the price you quote to him?

A. We quote the destination price.

Q. What does that include?

A. That includes the Mason City price plus the package plus the freight.

Q. Why do you quote the destination price?

A. Because that is the price that he pays for the cement. He pays for the cement and the freight and the package.

Q. Do you have, Mr. Pray, in your company, 3 what is known as a base price?

A. A base price?

Q. Yes.

A. That would be our Mason City mill price.

Q. That is the same to every customer?

A. That is the price of cement in the bin.

Q. Is that the same price to each customer?

A. Yes.

Q. To that, in order for the customer to determine his price, what is added?

A. We add the package and the freight to the Mason City price, or we call it Mason City mill price.

Q. Is the package charge the same?

A. The package is the same price. We charge 30 cents a barrel for paper bags for them.

Mr. Maun: No other questions.

By Mr. Abdnor:

Q. Then the price your salesmen quote to the customer, and the price he is billed, is f.o.b. destination price, isn't it?

A. We invoice the customer on the basis of the f.o.b. destination, and the freight is prepaid.

Mr. Abdnor: Thank you.

By Mr. Maun:

Q. Why does the salesman carry the rate book?

A. In order that he can properly answer the question when it is put to him as to what is the price of cement in Willmar. He looks up the rate and he finds the rate is 68 cents a barrel from Mason City to Willmar, and he can add 30¢, and that is the way he gets at it.

By Mr. Abdnor:

Q. He uses the same base price to which he adds the freight?

A. Right.

Q. And that freight rate depends on the published rate?

A. That is the regular tariff rate prepared by our traffic manager. It varies at every town. The farther we go the more it is. 1

Mr. Abdnor: No further questions.

Mr. Maun: Nothing further.

WILLIAM RALPH WILKINS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Maun: 2

Q. Your name is Ralph Wilkins?

A. William Ralph Wilkins.

Q. For whom do you work?

A. Northwestern States Portland Cement Company.

Q. When did you commence working for them?

A. October 20, 1944.

Q. When you commenced working for them, who hired you? 3

A. G. B. Pray, sales manager.

Q. Where were you living at the time you were hired?

A. My address was 4347 First Avenue South, Minneapolis.

Q. Where did you make application for employment?

A. I heard of the job through my father-in-law, and substantiated that by calling the Minne-

1 apolis office, and then making application though Mr. Pray and being hired by him.

Q. Where did you interview Mr. Pray?

A. In the Minneapolis office.

Q. Did you go to the Mason City office at all?

A. Yes, after talking with him at Minneapolis and after his approval of me at Minneapolis, I went to Mason City for further instructions, and to study their methods of business.

Q. Did you make any application for em-
2 ployment to anyone in the Minneapolis office?

A. No.

Q. Who fixed the terms of your compensation?

A. Well, in the application it asked what compensation I expected, and I put down a figure.

Q. Was your compensation fixed by someone in Minnesota, or did Mr. Pray fix that?

A. That was set by the Mason City office and Mr. Pray.

Q. After you were employed, where were you
3 stationed?

A. In the City of Minneapolis and St. Paul.

Q. What were your duties in that position?

A. My duties were normal sales procedure, to call on retail dealers, Ready-mix plants, concrete block firms and line yards.

Q. Who told you what your duties were to be?

A. Mr. G. B. Pray.

Q. Who told you what companies and types of companies you could call on? 1

A. Mr. Pray.

Q. Who was in the office in 1944 when you were hired?

A. Will you clarify that please?

Q. What persons were also working out of the Minneapolis office or in the Minneapolis office at the time you were employed?

A. The stenographer was a lady by the name of Doris Hoaglund, who is no longer with the company and has not been since 1945 or '46, I don't recall. The other party in the Minneapolis office was P. A. Danielson, who has been retired for four years or more. 2

Q. Has anyone else been in the Minneapolis office?

A. Yes, Mr. Yokum was employed by Mr. Pray in 1952.

Q. Where are you working?

A. I am assistant sales manager at Mason City presently. 3

Q. You are no longer in the Minneapolis office?

A. No, sir.

Q. How long was Mr. Danielson with the company after you became employed?

A. I believed he was retired in either 1950 or 1951.

Q. What did he do while you were working for the company?

A. Well, Mr. Danielson's duties were similar to mine, except that when I was first employed I did not call on the line yards. After Mr. Danielson's retirement, Mr. Pray advised me that it was my duty to then call on the line yard people.

Q. Will you tell the Court just what this Minneapolis office is like, physically.

A. Do you want the dimensions of the office?

Q. Just generally, yes.

A. The Minneapolis office consists of three rooms. One room in size is somewhere ten to 20 feet, the large room, and then there is a smaller office, 10 by 12 or thereabouts, and the other room is 6 by 6 or 6 by 8, and that room is used as a storage room. In the outer office there is a file cabinet and three or four chairs and two desks.

Q. While you were working for the company and prior to 1948, did you ever hire or fire any employees?

A. I never had authority at any time to fire or hire.

Q. Did you purchase any supplies of any kind for the company?

A. The only supplies ever purchased by me were the stamps which we used to mail our mail to Mason City, and I purchased those in blocks of 100 stamps at a time and placed them on my expense account, which was forwarded to Mason City, and I was reimbursed for that expenditure.

Q. Have you ever been authorized to draw

checks or drafts on the account of the Northwestern States Portland Cement Company? 1

A. At no time in my ten years have I had that authority.

Q. Just tell us what constitutes a day's work on your part, and I have reference to the period between 1944 and 1948.

A. That would vary.

Q. Tell us generally what it was.

A. Usually I would call on retail building supply dealers, and sometimes I would call at an architect's office and do some promotional or missionary work with no thought of business at that time or at any future time, just merely to make a personal acquaintance and also acquaint him with the company. I call on a concrete products plant or a Ready-mix firm, or there may be a sidewalk going in as I go by. If it were our brand of cement I would ask them if they were satisfied with the product, and if it were a competitor's brand, naturally I would speak for Northwestern States. 2

Q. Who is Mrs. Humphrey? 3

A. Mrs. Humphrey is in the Minneapolis office presently.

Q. Was she employed after you became an employee of the company?

A. Yes, she was.

Q. Who employed her?

A. G. B. Pray.

Q. Did you have anything to do with the employment of her?

1 A. No, in fact when she was employed I don't believe I was in the office.

Q. Did you fix her compensation?

A. No, sir.

Q. Do you have a telephone that comes into that office?

A. There are two lines.

Q. Does the name of the company appear in the Minneapolis telephone directory?

A. Yes, sir.

Q. In what place?

2 A. In the regular directory we are listed, and also in the classified, under cement manufacturers and wholesalers.

Q. Where does the Minneapolis office obtain its ordinary supplies for day to day operation?

A. All supplies are requisitioned from the Mason City office.

Q. You have a storage room in this office?

A. Yes.

Q. What is kept in this storage room?

A. Scratch pads, pencils, blotters, ink for our
3 office use, maybe a typewriter ribbon and a few Portland cement pamphlets.

Q. Do you keep any cement?

A. No, sir.

Q. Does the company have a bank account in the State of Minnesota?

A. Not to my knowledge.

Q. What employees of Northwestern States Portland Cement Company work out of the Minneapolis office?

A. Presently? 1

Q. During 1944 to 1948?

A. From the time I went there through 1948, as I stated previously, Miss Hoaglund, and then she left the employ of the company and Mrs. Humphrey presently takes over in her job, and Mr. Danielson and myself.

Q. How about Mr. Sig?

A. Mr. Sig lives at Willmar and had no connection with this office as far as any business transactions were concerned.

Q. Do you ever communicate with Mr. Sig 2 relative to company affairs?

A. No, sir.

Q. How about Mr. Youngstrom?

A. No, sir, the only time I talk to Mr. Sig or Mr. Youngstrom is when we are at the sales meetings at Mason City. We fraternize, as salesmen do, but it has no bearing on the transaction of any company business.

Q. Will you explain briefly the procedure you follow when you call upon a customer and he does give you an order for some cement? 3

A. You are speaking of the dealer?

Q. The dealer, yes.

A. You see, when I call on a dealer's office, and he should present me with an order while there, it usually will be on his order form and signed by him, and he will put a date of shipment or request a date of shipment.

Q. That will be a purchase order on the dealer's own purchase order form?

A. That is correct.

Q. Then what do you do with that purchase order?

A. I bring that back to the Minneapolis office and present it to Mrs. Humphrey, who in turn lists it on this daily order sheet, and it is forwarded to Mason City for acceptance there.

Q. Supposing that the dealer does not have his own purchase form, then what do you do?

A. If it is a rush order, I might pick up the telephone and call Mrs. Humphrey and ask her to contact Mason City and see if they will accept the order for shipment that day, or whenever the customer requests. She, in turn, presents it to the chief clerk at Mason City where it is processed through the normal channels there.

Q. Do you ever take an order on an order pad form which was introduced in evidence here?

A. When I first began working for the company I carried an order form, but seldom if ever, did I have the privilege of writing an order. Usually the dealer would say, "You are new here, and you don't need that pad." I phoned my orders in direct, and in other cases, some of the dealers preferred to place the order on their own pad so that they have a record.

Q. How would you learn that a dealer had placed an order direct with Mason City?

A. When the acknowledgment would be returned from Mason City that the order had been accepted.

Q. You would receive a carbon copy of that acknowledgment? 1

A. That's right.

Q. What would you do with the carbon copy you received?

A. Put it in the file.

Q. I notice in the deposition you gave earlier you said there was just one telephone line. Has there been a change since that date?

A. No, there were two lines in there before I came with the company, but what I considered one line was the fact that on the two phones, if one were busy, the other then always automatically rang. 2

The Court: Well, I guess this is a pretty good place to stop. Tomorrow morning at 10:00 o'clock.

(November 9, 1954, 10:00 a.m.)

WILLIAM RALPH WILKINS,

recalled:

DIRECT EXAMINATION. 3

By Mr. Maun:

Q. Mr. Wilkins, just what manner of use is made of your office here in Minneapolis?

A. The Minneapolis office is used for the convenience of the customer, and it is used for a clearing house for the orders they might phone in, or other line yards might phone or send by letter, and then they are sent on to Mason City after they are placed on the order sheet.

1 Q. When you call on a line yard in Minneapolis or St. Paul, just what is your procedure?

A. Well, many times when calling on line yards it is only a matter of good will. Other times it may be that they are interested in knowing the price of cement at a given point where they have a yard, and in that case we would use our rate book and take our mill price, which is an example I have here, take our standard Portland Cement—

Q. What do you mean by mill price?

2 A. Our price f.o.b. our mill.

Q. In the normal course of business do you receive quotations from Mason City as to the price at the mill?

A. Yes, in letter form when there is a change of price becoming effective on a certain date, say January 1 or July 1, when there might be a change in the price of our product.

Q. In what manner is that quotation sent to you?

A. It is sent on inter-office stationery in the 3 form of a letter.

Q. How do you use that letter in calling upon customers of the company?

A. As an example, if I were to call on a line yard who had an office at New Ulm, Minnesota, they might say, "What is your price of cement" so first I would say, "Our price of cement is $2.60 a barrel."

Q. Where?

A. F.o.b. cars, Mason City. Then the next statement he might make would be, "Well, what is my price at my place of business," so then it would be necessary to use our rate book. 1

Q. What is the rate book?

A. The rate book is a book prepared by our traffic department so we will know the freight rate into the different towns where we ship cement, or, as far as that goes, covering the shipping points in the State of Minnesota.

Q. In the quotation that is sent to you for your use in dealing with customers, is any reference made to freight rates? 2

A. None whatsoever. I have a letter here that clarifies that.

(Defendant's Exhibit 28 was marked for identification.)

Q. Mr. Wilkins, I show you Defendant's Exhibit 28 and ask you to look at it and see if you can identify it, and if you can do so will you tell us what it is.

A. This is a normal letter mailed to the different sales personnel by Mr. Pray, our sales manager, when a change of price is effective at Mason City. 3

Q. Is that a quotation which you, as a salesman, receive?

A. Yes, it is.

Q. Is that received in the normal course of business?

A. Yes.

1 Q. Is that part of the books and records of your company?

A. Yes.

Q. I notice the date on this is December 18, 1950. Did you look in your files and record to see if you could find a letter for an earlier date?

A. Yes, I did.

Q. Were you able to find such?

A. No, sir.

Q. Is this exhibit typical of the types of quotations which you received for the years 1944 2 to 1948 when you were working for the company in Minneapolis?

A. Yes, sir.

Q. Is this exhibit the same in all respects except for the price differential which may appear on earlier quotations?

A. Yes, sir.

Mr. Maun: Defendant's Exhibit 28 is offered in evidence.

By Mr. Abdnor:

Q. With this information that is in this docu- 3 ment, together with the rate book that you have, you are able to quote the customers prices on cement at any place of destination, aren't you?

A. Will you repeat that?

Q. With this information that is in this document, together with the rate book that you have, you are able to quote the customers prices on cement at any place of destination, aren't you?

A. No, sir, that is not quite correct. We can tell them what their freight rate is to destination.

Q. F.o.b. destination? 1

A. To their place of business, free on board at point of delivery.

Q. That is what they pay?

A. They pay the freight, but for convenience we prepay the freight for them.

Q. So you are able to quote them the price f.o.b. destination with that information and the book?

A. We give them a delivered price.

Mr. Abdnor: That's right. No objection.

The Court: Received. I want to find out what 2 this business means of being a member of the Portland Cement Association. It is not just curiosity, I mean the use of that name.

By Mr. Maun:

Q. Will you answer that question, Mr. Wilkins?

A. I am not familiar with that. I cannot answer that question.

Mr. Maun: We have our next witness who can answer that question.

Q. Do you obtain an order every time you 3 call upon a customer?

A. No, sir. When selling in the city of Minneapolis or St. Paul, I very seldom receive an order when I make a call. The orders were usually phoned to the Minneapolis office or came in by letter, and on an occasion, as I stated previously, the dealer might give me an order, but it was an

uncommon thing for me to receive an order when I made my call.

Mr. Maun: No further questions.

CROSS EXAMINATION.

By Mr. Abdnor:

Q. Mr. Wilkins, you and I have met before?

A. Yes, sir.

Q. As a matter of fact, we met when I caused your deposition to be taken last spring, is that correct, at which time you testified under oath at the deposition proceedings?

A. Yes, sir.

Q. You are the same Mr. Wilkins upon whom the summons and complaint was served in this case, are you not?

A. Yes, sir.

Q. Mr. Wilkins, I am going to review just a little bit the chronology you gave yesterday. I understand you came to work with the cement company in Minneapolis in 1944?

A. Yes, sir.

Q. At that time you did what type of work?

A. At that time, when first employed, as I stated, I succeeded Mr. Dierrell and called on the concrete products plants, architects, and Ready-mix firms, sidewalk contractors and contractors of a general nature, doing more or less missionary work and good will work for the company.

Q. When did that type of work change?

A. When Mr. Danielson retired.

Q. Mr. Danielson, in your first years, was doing what? 1

A. Mr. Danielson called on the line yards and dealer sales, and I assisted him somewhat in the Twin Cities dealer sales, however, when we were both with the company.

Q. If I understand correctly, when Mr. Danielson retired, that was in 1948?

A. No, sir, 1950 or '51.

Q. He retired in '50 or '51?

A. Yes, sir.

Q. When he retired, you succeeded to the work he was doing before? 2

A. When Mr. Danielson retired, it was necessary for me to do all the work, because I was the only one left in the Twin Cities in a similar capacity.

Q. Someone else ultimately came to work with you?

A. Mr. Yokum was hired later.

Q. And then he did the work you had done prior to Mr. Danielson's retirement?

A. Yes, sir. 3

Q. So then you stepped into Mr. Danielson's place by virtue of that arrangement?

A. Yes, sir.

Q. Then, if I understand your testimony correctly, during this year after your deposition last spring, you received a promotion?

A. Yes, sir, due to further retirements there were some changes in our organization and one of those affected me.

Q. You are now what?

A. Assistant sales manager in Mason City.

Q. Did you have a title before you went to Mason City?

A. No, sir.

Q. Then you wouldn't have called yourself an assistant sales manager while you were in Minnesota?

A. That's right.

Q. Of course, you wouldn't call yourself that unless you had authority to so identify yourself. Is that a fair statement?

A. Yes, I believe it is.

Q. Did you ever identify yourself while in Minnesota as being the regional manager or Minnesota manager?

A. No.

Q. You wouldn't have called yourself a regional or Minnesota manager unless you had authority to call yourself that, would you? That is a pretty obvious question, isn't it, Mr. Wilkins?

A. Yes and no.

Q. Would you have called yourself a regional manager or Minnesota manager unless you had authority to call yourself by that title?

A. I may have called myself something that the company would not call me.

Q. Then you may have called yourself a regional manager?

A. No, I at no time ever called myself a regional manager.

Q. Why would you call yourself something 1
that the company would not call you? Under what circumstances? You are not a bragging man, are you?

Mr. Maun: I submit that is a little argumentative.

The Court: The last part is.

By Mr. Abdnor:

Q. Answer the first part, why would you call yourself a regional manager if you were not that?

A. I wouldn't call myself a regional manager.

Q. Now, did you ever have occasion to iden- 2
tify yourself as being a district manager of this company?

A. On a few occasions I called myself that.

Q. You wouldn't have called yourself a district manager unless you had authority of your company to call yourself a district manager?

A. I did.

Q. Why?

A. I was the oldest employee after succeeding Mr. Danielson in the Twin Cities, and for 3
that reason on a few occasions I did.

Q. You called yourself a district manager?

A. Yes, I did.

Q. For what purpose? You must have a purpose for attaching that title to yourself, don't you?

A. No, sir.

Q. Would you do it on your personal credit obligations? Might you have?

A. I might have.

Q. Would you have done it in connection with company business?

A. I may or may not have.

Q. You may have held yourself out to be a district manager on company business in this state, might you not?

A. Not in this state.

Q. You never held yourself out in the State of Minnesota to be a district manager of this company on company business?

A. I called myself the Twin Cities district manager.

Q. You did call yourself a district manager then, didn't you?

A. On a few occasions.

Q. Yes, and it related to company business too, didn't it?

A. Will you clarify that, please?

Q. I mean in connection with the business of your company, did you ever identify yourself as being a district manager of that company? It is a simple question. You should know the answer to that.

Mr. Maun: Mr. Abdnor, I again submit your statement is argumentative.

The Court: I will sustain that. He is answering the questions.

By Mr. Abdnor:

Q. Under what circumstances would you hold yourself out to be a district manager?

A. Well, in clarifying that statement, the Twin Cities sales, the dealers were my responsibility, and it was my responsibility to call upon the line yards, not Mr. Yokum's but mine, and I probably made that distinction mostly for that reason. 1

Q. Did you ever tell the dealer that you were the district manager of the company?

A. No, they were informed when Mr. Danielson retired that I was the Twin Cities representative.

Q. Were you in the habit of holding yourself out to be a district manager? 2

A. Not generally.

Q. Not generally in the habit of it?

A. No, sir.

Q. You didn't sign your name and just at times automatically put down district manager?

A. No, sir.

Q. You don't recall that you ever did such a thing?

A. I believe I signed a letter, or maybe several letters with that title.

Q. You signed correspondence with that title as I understand you. Now, Mr. Wilkins, you heard Mr. Pra testify yesterday with respect to the property that your company owned in this state, the personal property in the office and so forth? 3

A. Yes, sir.

Q. You heard him testify with respect to the ownership of automobiles?

A. Yes, sir.

Q. Did you drive a company car?

A. Yes, sir, I did.

Q. Did other people here in Minneapolis drive a company car?

A. Mr. Yokum.

Q. Did you buy those cars in the manner he described, or were they bought in Iowa?

A. When I went with the company only two cars were purchased for my use. At that time cars were difficult to buy and bids—I was authorized to go and get bids from several companies which, in turn, were forwarded to Mr. Pray's office in Mason City, and the decision was made at Mason City whether or not those bids would be accepted, and the check for payment of those cars was made on Mason City.

(Plaintiff's Exhibit S was marked for identification.)

Q. You applied for a license on some of these automobiles?

A. Yes, sir.

Q. I am now going to hand you a series of documents, the front sheets marked Plaintiff's Exhibit S. I will ask you to look at the first photo-copy sheet and state whether or not the signature on that sheet is your signature?

A. Yes, sir, it is.

Q. Going now to the third photo-copy sheet, I will ask you to look at the signature on that sheet and tell me whether or not that is your signature?

A. Yes, sir. 1

Q. Is that application for an automobile license true and proper in all respects as you made it out?

A. It is except that I signed my name as district manager.

Q. You signed your name as district manager on this, didn't you?

A. Yes.

Mr. Abdnor: State's Exhibit S is offered in evidence. I might add, your Honor, for the record, that State's Exhibit S is a copy of an application for an automobile license certified to be correct by the Secretary of State of the State of Minnesota, and the certification is attached. 2

Mr. Maun: No objection.

The Court: Received.

By Mr. Abdnor:

Q. Exhibit S identifies a 1952 model Pontiac, Mr. Wilkins.

A. Yes.

Q. Did you drive that car?

A. No, sir, I did not. Joe Meyer drove that car. 3

Q. Where was that bought?

A. That was bought in Minneapolis.

Q. Was that one of those cars that was bought here because cars were so hard to get?

A. No, sir, that car, I believe was purchased after bids were submitted in the usual manner, as I suggested, and for convenience, because Mr.

Meyer previously drove a Pontiac and I drove a Pontiac and I had my service work done at that particular garage.

Q. That is a different reason than you gave here a while ago, isn't it?

Mr. Maun: I suggest that Mr. Abdnor is entirely wrong. The witness testified he purchased two cars for himself.

The Court: Well, I heard what his testimony was.

(Plaintiff's Exhibit T was marked for identification.)

By Mr. Abdnor:

Q. I now hand you a document marked Plaintiff's Exhibit T, being an application for automobile license and related documents, and refer to the third copy page, and I will ask you if that is your signature that appears on that page.

A. May I look at it?

Q. Please do.

A. Yes, sir, that is my signature.

Q. That appears on the third page?

A. Yes, sir.

Q. Now, you have already examined the next page and the fourth page, and I will ask you whether or not your signature appears on that?

A. Yes, sir, it is.

Q. Is the information contained on this application for a license true and correct as you have reviewed it?

A. My signature is correct.

Q. Is the other information there true and correct? 1

A. As district manager. That pertains to the Twin Cities.

Q. I am not asking you what it pertains to, I am asking you if that is correct information?

A. I was in charge of the Twin Cities district, and that is the reason I signed my name that way.

Q. That is the reason you signed as district manager for Northwestern States Portland Cement Company, is that what you said? 2

A. I probably should have signed my name as district sales representative.

Q. Now I make reference to the last sheet and ask you if that is your signature that appears on the last sheet of that exhibit?

A. That is my signature, and it pertains to the automobile which—

Q. I will ask you about the automobile later. That is your signature?

A. Yes, sir.

Q. Again you have identified yourself on that sheet as district manager? 3

A. Yes, sir.

Mr. Abdnor: I offer in evidence Plaintiff's Exhibit T, being an application for automobile license, and related documents, all certified to be true and correct copies by the Secretary of State.

Mr. Maun: Well, I will object to these on the grounds that they relate to years not before this Court, and not material.

1 Mr. Abdnor: May I make a statement?

The Court: Yes.

Mr. Abdnor: One of the issues raised by the pleadings in the defense of this case is that no proper service was made on a proper individual, and it has been established that this is the man upon whom service was made, and I believe that was in 1953.

Mr. Maun: If the exhibit is submitted for that purpose, then I would have no objection to materiality on that ground.

2 The Court: It may be material on both grounds. It is not anything that changes. I will receive it anyhow.

By Mr. Abdnor:

Q. Now, handing you again Plaintiff's Exhibit T, Mr. Wilkins, I will ask you if that does not describe a 1951 model Pontiac?

A. Yes, sir, it does.

Q. Did you drive that car?

A. Yes, sir, I did.

Q. That is one you used?

3 A. Yes, sir.

Q. That car was bought in the Twin Cities too, wasn't it?

A. That was bought at Lake Street Pontiac, yes, sir.

Q. Then that did not fall into the category of the two cars you purchased because of a shortage?

A. Yes, sir, that is the car.

Q. That is the car you bought in 1951 because automobiles were in short supply? 1

A. No, sir.

Q. Will you clarify your testimony?

A. Yes, sir, there was an instance where once again bids were asked for and received. At the time that car was purchased, I believe I got bids from four or five different automobile dealers.

Q. Do you recall testifying such a short time ago that you bought cars for yourself in Minnesota because of the shortage of cars?

A. That was true in 1946. You might check 2 the record and find there were two cars purchased in 1946. Mr. Meyer purchased one and I purchased the other.

Q. As long as you suggest it, I wish I could.

Mr. Maun: Can't you, Mr. Abdnor?

Mr. Abdnor: No, they are destroyed over six years back.

Q. Now, referring again to Plaintiff's Exhibit S, that document you signed in that exhibit identifying yourself as district manager, and that 3 was dated October 15, 1952. Was that correct?

A. Yes, sir, and it was signed in Minneapolis.

Q. Referring to the fourth sheet of Exhibit T, the document you signed as being a district manager in that exhibit, it was dated October 5, 1951, was it not?

A. Yes, sir.

Q. And the last document of that exhibit which bears your signature as district manager was dated October 15, 1952, was it not?

A. Yes, sir, that was for renewal of license plates.

(Plaintiff's Exhibit U was marked for identification.)

Q. I hand you now a series of documents identified as Plaintiff's Exhibit U. Calling your attention to the first copy page, I will ask you if that is your signature that appears on that page?

A. Yes, sir.

Q. And on that page you are identified as district manager in your own handwriting?

A. Yes, sir.

Q. And that was sworn to as being true and correct before a notary public of the State of Minnesota, was it not?

A. That was probably notarized after I signed it.

Q. That is what I mean. I now call your attention to the third copy page of this exhibit and ask you whether or not that is your signature appearing thereon?

A. Yes, sir, it is.

Q. And the words "district manager" appear in your own handwriting, do they not?

A. They do.

Q. On this exhibit, the first page is dated February 25, 1952?

A. Yes, it is.

Q. And the last page I showed you is dated October 15, 1952?

A. Yes, sir.

Mr. Abdnor: Plaintiff's Exhibit U is offered in evidence.

Mr. Maun: The same objection as was made to Exhibit T, that it is not material as to matters which took place subsequent to 1948, except on the question of service.

The Court: Overruled, received.

By Mr. Abdnor:

Q. Calling your attention now, Mr. Wilkins, to Plaintiff's Exhibit U, it will be observed that this licensed a 1952 Chevrolet, is that right?

A. Yes. May I clarify that?

Q. Did you drive this car?

A. No, sir.

Q. Who used this car?

A. Mr. Yokum used the car, and my reason for purchasing the license—

Q. I didn't ask you your reason for purchasing the license yet. Did Mr. Yokum purchase this car or did you?

A. Mr. Yokum was not employed when that car was purchased.

Q. So you purchased the car before Mr. Yokum was employed, is that right?

A. After submitting bids to Mason City and after receiving my instructions from Mason City to purchase a car for the new man. There were several being interviewed at the time and they wanted the car to be purchased and ready for the new man.

Q. Now, I will ask you what was anticipated

1 by your first question when you caused this car to be licensed on February 25, 1952.

A. Well, every new motor vehicle has to be licensed before it can be driven.

Q. Why did you do it instead of Yokum?

A. Mr. Yokum was not in the employ of the company at the time.

Q. Had he been there, would he have done it?

A. In all probability.

Q. That car was licensed again on October 2 15, 1952. Was Mr. Yokum there at the time?

A. Yes, he was.

Q. You applied for the license though?

A. I did. I also applied for Mr. Meyers' license.

Q. Then you applied for all the licenses?

A. As a convenience measure. License application was made at the Federal Building at Third Street and Second Avenue South.

Q. Mr. Wilkins, I am going to hand you a book and ask you if you have ever seen that kind 3 of a book before.

A. I have seen that book once at the Minneapolis Airport. I am familiar that there is a Minneapolis City Directory, as there are in all major cities.

Q. Have you ever used that?

A. No, sir.

Q. Do you know how to use it?

A. I believe that the names and addresses of

people are in there, yes. I can honestly say at no time have I ever used it. 1

Q. But you know this is a city directory?

A. Yes, it so states.

Q. I will ask you to look up the name of Northwestern States Portland Cement Company in that directory and read that entry to the Court.

A. "Northwestern States Portland Cement Company, William R. Wilkins, district manager, 1010 Roanoke Building."

Q. That is the address of your Minneapolis office? 2

A. Yes, sir.

Q. I will now ask you to refer to your own listing in this city directory, Mr. Wilkins, and read that to the Court.

A. "Wilkins, William R., district manager, Northwestern States Portland Cement Company, 7001 James."

Q. Is that your address?

A. It was.

Q. I think for further identification you should read the year to which this relates. 3

A. 1953.

Q. Mr. Wilkins, you heard Mr. Pray's testimony yesterday to the effect that you salesmen in the Twin Cities called on your customers more often than they do in the country.

A. That's right.

Q. You heard him say that you called on these Twin Cities customers more frequently than once every three weeks, is that correct?

A. At times, yes, and sometimes no. By that I mean this, it may be necessary at different times when calling at one customer that I might have been there today and immediately something would come up of a nature that he would like to discuss with me, and he would call me on the telephone and ask me to stop by and see him.

Q. You came to know these men pretty well by virtue of the calls you made on them?

A. Yes.

Q. You said a while ago that when you went in and called on the customer, your first price was the f.o.b. price Mason City, and that was so much, and the customer would respond and say "How much is the freight and how much would it cost here," and you would say that the cost here was so much. If you called on a customer a few times, you didn't go through all that conversation before you told him how much that cement was delivered, did you?

A. After I had called on the customer a few times—in fact, even probably the first time I called, the cement price would not be mentioned at all. As I stated many times previously, many calls were of a good will nature.

Q. Let's talk about those calls in which you are quoting prices to the customer. When you quote prices to a customer, you know well, you don't go through this formality of quoting f.o.b. Mason City and having him ask you how much it is delivered. Isn't it a fact when you did quote

him, you quoted him the price without this question and answer proposition you referred to earlier? 1

A. Not in all cases, no.

Q. In some cases at least you do it that way, just give them the delivered price when they ask the price.

A. Those quotations are mailed from Mason City.

Q. Let's get back to my question.

Mr. Maun: Give the witness a chance.

The Court: Go ahead. 2

The Witness: As Mr. Pray stated yesterday, the line yard operators in many cases, in fact in most cases, they request a complete price list from Mason City on mixed car commodities, and also on their freight cars of cement.

By Mr. Abdnor:

Q. Your earlier testimony had reference to the occasions on which you quoted prices to customers. Do you recall that testimony?

A. Yes, sir, I do.

Q. Do you recall that you said you would give them an f.o.b. price and they would say, "Well, how much is the freight, or how much is it delivered here," and then you would compute the freight price and give them that? 3

A. Yes, sir.

Q. My question simply is that on many occasions when you are asked for a price of cement, you give the delivered price immediately.

A. We had to quote the f.o.b. Mason City price.

Q. A customer in Minneapolis who has a Minneapolis place of business asks how much cement is and you gave him the delivered price in Minneapolis?

A. We gave him the Mason City price plus the freight.

Q. You don't say to him, well, in Mason City it is so much, and then he will say, "How much is the freight?" In other words, the testimony you gave is not accurate with respect to every case in which you quote prices.

A. Most of the customers, in fact 95 per cent of the customers that I have called on in my tenure in the cement business, were in the business prior to my time in the cement industry, and many of them prior to the time I was born, and they probably know as much or more about the cement business than I do.

Mr. Abdnor: I move that be stricken as not responsive.

The Court: Stricken out.

By Mr. Abdnor:

Q. Now will you read the question, please.

(Last question read by reporter.)

A. The price changes that come from Mason City to me, when there is a change in price, is our f.o.b. Mason City price, and to that we add our freight, and that is the delivered price at the dealer's warehouse.

Q. When a customer asks you the price of cement, do you give him the delivered price right off the bat? 1

A. No, sir, because sometimes in the case of a line yard, as I outlined to you before, it is necessary to use the rate book, but we can tell him what his price will be at a particular point of delivery, or his delivered cost.

Q. If you call on a cement purchaser in the Twin Cities with his place of business here, that you have called on 50 or 75 times before, and he asks you the price of cement, what do you tell him? 2

A. The Minneapolis or St. Paul dealer usually knows the price.

Q. They never ask you the price?

A. They are advised every time there is a change.

Q. Will you answer the question. Do they ever ask you the price of cement? Have you ever been asked by a Twin Cities dealer, the price of cement? 3

A. Maybe on one or two occasions.

Q. In other words, nobody has ever asked you how much cement is?

A. I am speaking now of Twin Cities dealers.

Q. Yes, I am too.

A. Because they have a number of cement people calling on them and they have a number of railroad representatives calling on them. They know the freight rate as well as we do, and they

1 also know the cost at our mill and the cost at competitive mills.

Q. Is the cement price the same among all companies?

A. No, sir.

EXAMINATION.

By the Court:

Q. Do you have any authority at all to meet competition prices occasionally, and make adjustments and one thing and another to meet the 2 competition of some company to get a piece of business?

A. Do I personally, sir?

Q. Yes.

A. No, sir. Anything of a policy nature or any change in any program would be authorized through Mason City. It would not be authorized by me.

Q. If you wanted to get a deal and you wanted to make a little adjustment in price, you would call Mr. Pray, is that the idea, or who 3 would you call?

A. You are speaking now of the Twin Cities market?

Q. Yes.

A. No, sir, because we didn't make any deals. We have one price into the Twin Cities.

Q. And you don't budge, is that it?

A. That's right, sir.

Q. That is your price plus the freight cost?

A. That is our Mason City price plus the freight. Whether it be St. Paul or Minneapolis, the freight is the same, plus your three per cent Federal tax. 1

Q. Is all the cement that you get orders for here in the Twin Cities, or all in Minnesota for that matter, is it always delivered by train, or is it occasionally delivered by bus or truck?

A. Always by rail. We have no facilities for loading anything else.

Q. Suppose a buyer wants to go down to Mason City and pick it up. 2

A. No, sir, he is not permitted to do so.

Q. You won't let him do it?

A. That is correct.

Q. Even if he lives 50 or 60 miles?

A. Even if he lives in Mason City proper. There are a number of lumber dealers and building supply houses and Ready-mix firms there, and all their cars are loaded and shipped to them.

Q. Right in Mason City?

A. Yes, sir.

Q. You load a freight car and unload? 3

A. We don't unload it, it is transferred to their place of business.

The Court: That is all.

CROSS EXAMINATION.

By Mr. Abdnor:

Q. If I understand your testimony correctly, from 1944 to 1954 there were only one or two

occasions when you were asked for the price of cement?

A. I am speaking of me personally.

Q. Yes, you personally.

A. There were very few occasions.

Q. And I understand your testimony is that only once or twice in all those ten years were you called upon to give the price of cement?

A. Will you please word that a little differently.

Q. I am trying to quote your testimony.

The Court: Would you like to have the question read, or have him restate it? What do you want?

The Witness: I would like it stated in a little different way.

The Court: That is saying you don't understand it?

The Witness: Yes.

The Court: All right, he has a right to say that.

By Mr. Abdnor:

Q. Is it your testimony that in the nearly ten years that you worked as a salesman in the Twin Cities, you only were called upon to quote the price of cement once or twice in that period? Is that your testimony?

A. In general terms I believe it was. Now, in speaking of Minneapolis and St. Paul, I am not speaking about when the line yard people called up when I was asked by them, because that has no bearing on Minneapolis and St. Paul.

Q. I understand that. 1

A. No, I was asked from time to time by the line yards what the prices were, say at New Ulm or maybe Marshall, Minnesota, or some one point, and then, of course, it would be many, many times more, but usually I wasn't asked the price of cement by my Twin Cities accounts.

Q. Now, as I recall Mr. Pray's testimony, your company sold products other than cement, is that right?

A. For the convenience of small country lumber yards throughout Minnesota we did stock 2 at Mason City a supply of plaster and lime, and white cement where they might put ten sacks in a car, or twenty, and a ton of lime, where the dealer was of a small nature and didn't feel he could afford to buy a carload of lime because his call for that product was such that it would be a wasted investment. For a convenience measure, there again the company did carry and still does carry a stock of lime and white cement. We do not any longer carry plaster.

Q. During the years that you carried plaster— 3 you have carried plaster during the years you worked for the company?

A. Yes, sir.

Q. Did you ever sell any plaster or these other non-manufactured products, or I mean products not manufactured by your company, in the Twin Cities?

A. No, sir.

Q. Never sold any?

A. Not to my knowledge.

Q. There are some small independent lumber yards in the Twin Cities.

A. We do not sell to lumber yards in the Twin Cities. There is a gentleman's agreement between the hard material dealers and the lumber dealers that one does not stock lumber and the other does not stock plaster and cement.

Q. None of your lumber dealers sell it?

A. Not to my knowledge. At least we don't sell any to them.

Mr. Abdnor: That is all.

By the Court:

Q. You say lumber yards don't handle cement?

A. In the suburbs they do, but in Minneapolis and St. Paul proper.

Q. Mr. Pray was talking about Fullerton's.

A. You are thinking of the George Fullerton yard in St. Louis Park, while the Fullerton Lumber Company is owned by his brother Jim, and they have a string of about 100 yards throughout two or three states.

RE-DIRECT EXAMINATION.

By Mr. Maun:

Q. Will you explain a little more fully about making application for a license on these automobiles? You were going to say something about how you happened to do it.

A. Well, Mr. Pray would send the three ap

plications for license plates to me and asked that I secure the licenses. That is how it came about, and that happened, I believe, two or three years that I did it, and Mr. Danielson used to do it prior to that time, and sometimes we would individually put the licenses on our expense accounts. If Mr. Danielson couldn't get them for us we would pay for our own licenses, otherwise at the end of the week when I mailed my expense account in, I would put all three licenses in. Sixty dollars is quite a bit of money for one person to be holding the bag for at any one time. 1 2

Q. Who instructed you to sign your name as district manager?

A. No one. I did that on my own.

Q. Did anyone ever instruct you to sign your name?

A. No, sir. There again I did it myself.

Q. Were you ever informed by any officer of the company that you were a district manager?

A. No, sir.

Q. Were you ever informed by Mr. Pray that you were a district manager? 3

A. No, sir, not district manager.

Q. Your last answer is not quite clear. You leave something hanging when you say "No, sir, not district manager." What do you mean by that?

A. Well, I was called district sales representative, and that meant Minneapolis and St. Paul.

Q. Who called you that?

A. Well, Mr. Pray called me that once or twice, personally, to myself.

By the Court:

Q. Called you what?

A. District sales representative.

Q. Mr. Pray did?

A. Yes, sir.

By Mr. Maun:

Q. To what district did he refer?

A. Minneapolis and St. Paul.

Mr. Maun: May it please the Court, I do not know whether the original summons and complaint have been found in this action.

The Court: No.

Mr. Maun: I wonder if it might not be stipulated then, that the service of the summons and complaint was had on Mr. Wilkins, who is now a witness?

Mr. Abdnor: It may be so stipulated, that it was served on Mr. Wilkins.

Mr. Maun: No further questions.

RE-CROSS EXAMINATION.

By Mr. Abdnor:

Q. I just have one brief question. We have referred to the Twin Cities sales territory. Can you briefly identify it geographically?

A. Yes, the Twin Cities sales territory would be Minneapolis and St. Paul proper, and South St. Paul.

Q. Does it include any suburbs besides South St. Paul?

A. Well, Richfield, St. Louis Park and Golden Valley.

Q. Would it include all of Hennepin and Ramsey Counties?

A. No, sir. Mr. Meyer called on dealers in Hopkins and Excelsior and North St. Paul and places like that.

Q. How about White Bear?

A. White Bear was handled by Mr. Meyer.

Q. And you say that geographically then, the trade territory takes in the Twin Cities proper and the suburbs that are immediately adjacent to it?

A. I think that is all.

Mr. Abdnor: That is all, thank you.

Mr. Maun: No further questions.

The Court: Take a five minute recess.

(Recess.)

PETER ANDERSEN,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Maun:

Q. Mr. Andersen, where are you employed?

A. Mason City.

Q. By whom?

A. Northwestern States Portland Cement Company.

Q. What is your position with that company?

A. At present I am vice president and assistant general manager.

Q. How long have you had this position?

A. Since the first of June.

Q. Prior to that time, what was your position with the company?

A. Secretary and treasurer.

Q. For what period of time were you secretary and treasurer?

A. I was secretary from 1929, and I was secretary and treasurer from 1941.

Q. As secretary and treasurer of the company, what were your duties?

A. I had charge of the accounting department.

Q. In charge of the accounting department, what exactly did you do?

A. I performed all the duties of a secretary and I had charge of the books and records of the company.

Q. During the years 1933 to 1944, were you familiar with the operation of the Minneapolis office?

A. Yes.

Q. You have been in the court room during the testimony of Mr. Wilkins, have you not?

A. Yes.

Q. And during the testimony of Mr. Pray?

A. Yes.

Q. Was there any difference in the operation of the Minneapolis office prior to 1944? From 1933 to 1944 than from 1944 to 1948?

A. I think the general plan of operation was the same.

Q. There has been some reference here to a listing of your company in the Minneapolis city directory. Was that listing authorized by the Mason City office of Northwestern States Portland Cement Company? 1

A. Not to my knowledge.

Q. As treasurer of the company, were you in charge of the payroll records of the company?

A. Yes.

Q. Under what title was Mr. Wilkins carried?

A. Salesman. 2

Q. Was that true during all the period of time up until the time he was appointed assistant sales manager?

A. Yes.

Q. What is meant by the Portland Cement Association, Mr. Andersen?

A. The Portland Cement Association is a national organization, an association of the Portland cement manufacturers. Its primary purpose is the promotion of the use of cement and concrete. They also do considerable in the research line. 3

Q. What does the word "Portland" mean?

A. Well, that is the type of cement that we manufacture. It derived its name originally from the fact that it was developed in England, and the resulting concrete they thought, looked like the rock outcroppings around Portland, England, and it acquired the name that way.

Q. Are you familiar with the pricing practices of your company?

A. Generally, yes, sir.

Q. Was there any change in prices between the years 1944 and 1948 to the Twin Cities marking area?

A. I don't believe I could answer that question offhand. Quite likely there were no changes during that time, but I can't say that for sure.

Q. Are prices changes common in your industry?

A. No.

Q. About how often would you say there is a price change?

A. Sometimes the price will remain the same for many years.

Q. Did you have any different classes of customers in the Twin Cities area or in the Minnesota area insofar as price classifications are concerned?

A. No.

Q. What do you mean by that statement, Mr. Andersen?

A. Our price was certified at the same for everybody.

Q. Would you give anyone the benefit of a favorable price if they were a quantity purchaser?

A. No.

Q. Who handled the collection of delinquent accounts in Minnesota, Mr. Andersen?

A. The matter of credits and the collection of accounts was something I had charge of all during that period.

Q. During what period do you have reference to? 1

A. From '33 to '48.

Q. If an account became delinquent in Minnesota, what would be the procedure with reference to it?

A. My procedure would be to write them, and if that didn't do any good, I would have to come up here and see them.

Q. Did you work through the salesmen in Minnesota insofar as collection of accounts was concerned? 2

A. No, I didn't work through salesmen. Sometimes I would have the salesmen take me around if it was an outlying country point. I would come up and join the salesman and have him take me there.

Q. Who passed on the credit of customers when orders came in?

A. I did.

Q. You did that personally?

A. Yes.

Q. Who handled the adjustment of customers' complaints, Mr. Andersen? 3

A. Well, those would be handled by the sales department.

Q. Who in the sales department?

A. Well, it would be the sales manager.

Q. Did you at any time authorize the salesmen working in Minnesota to pass upon the credit of customers?

A. No.

Q. Showing you Defendant's Exhibit 11, Mr. Andersen, I will ask you if you recognize that exhibit?

A. Yes.

Q. Just what is that?

A. This is our invoice which is made up in our office, apparently in five copies.

Q. Made up in your office where?

A. Mason City.

Q. What becomes of those copies, Mr. Andersen?

A. Normally the first two, the original and the duplicate, would be mailed to our customer along with the bill of lading. The office copy would be retained in our office in Mason City, and the last two copies, or the last three copies represent the bill of lading.

Q. Now, I show you Defendant's Exhibit 9, Mr. Andersen, and I will ask you if you recognize that, and if you do so, will you tell us what it is.

A. Defendant's Exhibit 9 is a load order.

Q. In your normal course of business, do you have anything to do with the load order?

A. The second copy of this load order, after the car has been loaded, would come to the accounting department for invoicing, and prior to loading it would come to the credit department for a credit okay.

Q. Would you or someone under your jurisdiction pass on the credit?

A. Yes, either I or my assistant would pass on the credit. 1

Q. What would happen in cases where the credit was not approved?

A. The car would not be shipped.

Q. Is the credit of the customer passed on in each instance regardless of the manner in which the order comes in to your company?

A. That's right.

By the Court:

Q. In every instance you pass on it even though you have done business for a long time? 2

A. Yes, every load order that goes through the office has either my okay or my assistant's.

By Mr. Maun:

Q. Every order that is shipped out of your plant?

A. Each individual car.

Mr. Maun: No further questions.

CROSS EXAMINATION.

By Mr. Abdnor: 3

Q. Mr. Andersen, with respect to price changes, I realize that you were not certain on that matter, but I wonder if you do recall that controls were lifted by the Federal Government in 1946. Do you recall that?

A. No, I don't recall that date.

Q. You recall that controls were lifted by the Federal Government?

A. Yes.

1 Q. Were your products subject to control at the time that the wartime laws were enacted?

A. I am not even sure on that.

Q. Oh, you don't know about that?

A. No, I am not sure.

Q. You don't know whether or not costs of your company increased like they increased in many industries following the lifting of controls, that is, labor costs and material costs?

A. Yes, they have been going up steadily right along.

2 Q. Wouldn't that indicate from that, that there had been some increases from time to time?

A. There have been, but I am not sure about this four year period.

Q. You don't recall whether or not within that four year period, without knowing at this time when controls were lifted by the Federal Government, whether or not your prices went up then?

A. Frankly the controls wouldn't have anything to do with it. I just don't know whether we 3 had a price increase then or not.

Q. Do you know how many price increases you have had since 1944?

A. Not offhand, no.

Q. So that your statement with respect to the fact that price changes sometimes don't occur for many years, is not necessarily applicable to this period following, let us say, World War II?

A. I am not sure.

Q. What I mean is that you qualified your earlier statement by saying you are not sure as to the period following World War II. 1

A. I am not sure about the period you are talking about.

Q. Let's talk about the entire period of World War II. Is your statement with respect to the frequency of price changes applicable anywhere in there?

A. I would say that during that period you have stated now, there probably have been about three price changes. 2

Q. You are not sure just when they came?

A. No.

Q. Mr. Andersen; the income tax return forms which were offered in evidence by the State show on them that you had a deduction from gross income allowed, or a credit allowed, on account of contributions made by your company to the Minneapolis Community Chest. Are you familiar with that?

A. Yes. 3

Q. Did your company make contributions to the Minneapolis Community Chest?

A. Yes.

Q. That was a regular year-to-year practice?

A. Yes.

Q. That went on during the time that you were with the company, and specifically from 1933 to 1948?

A. I believe so.

Mr. Abdnor: That is all.

Mr. Maun: I have no further questions.

EXAMINATION.

By the Court:

Q. You say this Portland Cement Association—is that what you call it?

A. Yes.

Q. What do you do, get a franchise or something, from that association to operate?

A. No, we are members of the association.

Q. All right, that is the same thing. Once you are a member you are entitled to sell the product?

A. It is a cooperative frame for a research organization supported by the whole cement industry of the United States and Canada.

Q. Atlas would not support Portland, would it?

A. Universal Atlas?

Q. Yes.

A. They make Portland cement.

Q. Oh, they do?

A. That is their product.

Q. So the word Portland then, has to do with the quality of the product, how it is manufactured?

A. Yes, how it is manufactured.

Q. When you became a member of the association, were you allocated certain territory in which you could sell your product?

A. No, sir. 1

Q. When did you become a member?

A. Oh, we have been a member since—as long as I have been with the company.

Q. Probably as long as the company has existed?

A. No, I believe our company is a little older than the association.

Q. With that name Portland too? You changed the name?

A. No.

Q. Isn't the name of your company Northwestern States Portland Cement Company? 2

A. Northwestern States Portland Cement Company.

Q. So you used the name before the word Portland existed?

A. No, we were talking about the Portland Cement Association.

Q. Then you do, down there in Mason City, actually mix or manufacture the Portland cement?

A. We do.

Q. What is it manufactured from? 3

A. Limestone and clay.

Q. Obtained from where?

A. Right at our plant.

Q. Have you got limestone right there at Mason City?

A. Yes.

Q. Where, in the hills around there?

A. No.

Q. Where do you get it from?

A. There is a deposit right there adjacent to the plant.

Q. And clay too?

A. Yes.

The Court: That is all.

RE-DIRECT EXAMINATION.

By Mr. Maun:

Q. Mr. Andersen, you are perhaps so familiar with this matter you think everyone else is. The word "Portland" is merely a designation of a type of cement?

A. That's right.

Q. It is not a patented process or anything of that kind?

A. That's right.

Q. Anyone can commence the manufacture of Portland cement and use the name?

A. Right.

Q. And this association to which you belong is merely a trade association?

A. Yes.

Q. It has no control of any kind whatsoever over your manufacturing processes or your use of the word?

A. None whatever.

Q. Your company manufactures cement from materials gathered locally in Mason City, Iowa?

A. That's right.

Q. Are any of those materials obtained in the State of Minnesota?

A. No.

Mr. Maun: That is all.

By Mr. Abdnor:

Q. Mr. Andersen, the Portland Cement Association does not attempt to get itself involved into competition as between companies?

A. No.

Q. It does not attempt to favor your company over another company?

A. That's right.

Q. You are all members of this organization, let us say, here?

A. That's right.

Mr. Abdnor: That is all.

Mr. Maun: No further questions.

Mr. Maun: The defendant rests.

DANIEL J. LEAHY,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Abdnor:

Q. Mr. Leahy, where do you live?

A. 3834 Huntington Avenue, St. Louis Park.

Q. You appear here in response to subpoena that was served upon you?

A. That is correct.

Q. Where are you employed?

A. Northwestern Bell Telephone Company.

Q. How long have you been employed by the telephone company?

A. Thirty-three years.

Q. What position do you now hold?

A. I am assistant to the manager of the Minneapolis division.

Q. Are the files and records of the company with respect to any particular subscriber under your jurisdiction and control?

A. Yes, sir.

Q. Did you bring with you your files and records insofar as they relate to the subscriptions with your company of the Northwestern States Portland Cement Company?

A. Yes, sir.

Q. Do your records disclose that the Northwestern States Portland Cement Company is a subscriber to telephone service in the City of Minneapolis?

A. Yes, sir.

Q. Do your records disclose how long they have been a subscriber?

A. According to our available records, the service was installed on January 4, 1915.

Q. According to your records, has that service been maintained to date?

A. Yes, sir, and it is presently a working service.

Q. Will you explain what you mean?

A. Well, they still have telephone service under the same name, Northwestern States Portland Cement Company.

Q. Was there an address in your records given for the service that was installed in 1915?

A. Well, I haven't the original records here. We tried to find it, but it is not available. It goes back such a considerable distance that we were not able to locate it, but to the best of our knowledge, it has been, for many years at least, located at 1010 Roanoke Building. 1

Q. In Minneapolis?

A. In Minneapolis.

Q. As a matter of fact, do not your records disclose that substantially the same numbers have been maintained by the company?

A. Substantially so. The same telephone number, you mean? 2

Q. Yes.

A. Yes, sir.

Q. As a matter of fact, they are exactly the same.

A. I believe that is correct, sir.

Q. Now, with respect to listing in your Minneapolis Directory, do your records disclose that the Northwestern States Portland Cement Company is listed in your Minneapolis Directory? 3

A. Yes, sir.

Q. Is it listed in what we commonly know as the yellow sheets?

A. Yes, sir.

Q. Will you describe what the yellow sheets are, or what the classified service of your directory is?

A. It is a directory where we list various business classifications for subscribers that have busi-

1 ness telephone service. Basically, together with advertising which we sell, it enhances the value of the telephone service to the business customers.

Q. Now, to be perfectly fair about this, this defendant, Northwestern States Portland Cement Company, is listed, but it does not advertise in that directory?

A. No, sir.

Q. It carries none of this paid advertisement?

A. No, sir.

Q. But it is listed in the yellow section?

2 A. In both the alphabetical and classified sections. The listing is a part of the service in the yellow or classified sections, insofar as the Minneapolis service is concerned, for all business customers.

Q. Now, with respect to listing in the classified directory, what is the policy of your company in determining under what heading the listing should be made?

A. Most businesses fall rather naturally under a given heading, such as, in this case, North-

3 western States Portland Cement Company. Well, we have a classified heading under "cement, wholesalers and manufacturers," and obviously that is where they are and have been listed under that heading in the classified or yellow section of our Minneapolis directory.

Q. You have other listings for cement?

A. Yes, we have other sub-headings under cement.

Q. Would it be obvious to you from the names, that they would belong under wholesalers? 1

A. No, sir, I don't mean it would be that way. It could fall under any given section of cement, but most of our businesses are classified that way.

Q. How do you determine under what subheading or classification, any particular company would be listed?

A. According to whatever the company's wishes are in that regard, because we are in no position to judge as to the kind or character of business they are engaging in. 2

Q. Is it your policy to consult the company?

A. At the time the service is negotiated, yes, sir.

Q. I suppose your records disclose that this listing, both in the alphabetical and classified, has been there for many, many years?

A. I would say since the original installation we have a record of, in January, 1915.

Q. Now, I will ask you whether or not every business telephone, such as was subscribed to by this cement company in Minneapolis, is listed in the Minneapolis directory and is also, as a matter of practice, listed in the St. Paul directory? 3

A. Would you repeat that?

Q. A Minneapolis business telephone subscriber is listed, as a matter of right, without any cost?

A. That's right.

1 Q. And is also listed in the St. Paul telephone book as a matter of right and without extra cost?

A. No, sir.

Q. I will ask you whether or not this company has been listed, according to your records, in the St. Paul telephone book?

A. Yes, they have been.

Q. That is, as to the alphabetical listing. Will you tell me when, as your record discloses, they became listed in the St. Paul book?

A. Well, one listing that we have record
2 of, does not indicate the year in which it was installed, but it would appear to have been in some time prior to 1946.

Q. Now, is that the alphabetical listing?

A. The alphabetical section I am referring to now.

Q. You say your records indicate that was some time prior to 1946?

A. Yes, sir.

Q. Has that service been maintained to date?

A. Yes, sir. Of course, there has been one
3 change. Whether that listing has been taken out now due to this recent change over and our metropolitan service plan where a charge no longer applies to St. Paul or a call from St. Paul to Minneapolis—

Q. That change was in 1954?

A. October 17, 1954, this year.

Q. Does your company make an extra charge for the alphabetical listing of this Minneapolis business telephone in the St. Paul directory?

A. Yes, sir.

Q. Now, with respect to the listing of this company in the St. Paul classified directory, what do your records disclose with respect to that?

A. We have carried an additional listing in the St. Paul directory, in the classified section.

Q. Do your records disclose how long you have carried that listing?

A. Well, we installed one listing in 1944 in the St. Paul directory under the classified heading of "Cement, wholesalers and manufacturers", with a monthly related charge for carrying that listing.

Q. Is that monthly related charge for carrying that listing in the St. Paul classified directory, a different and separate charge from carrying the listing in the St. Paul alphabetical?

A. Yes, it is. One does not presuppose the other. You can have one without the other.

Q. And that service in the classified directory has been maintained up until at least the past year?

A. Yes, sir.

Mr. Abdnor: That is all, thank you, Mr. Leahy.

CROSS EXAMINATION.

By Mr. Maun:

Q. You do not know of your own knowledge whether the defendant in this action is the same company that made the listing back in 1915?

A. No, sir, I would have no direct knowledge of that, sir.

Q. You didn't intend to infer by your testimony that this was the same company?

A. No, I did not. The name has been maintained on a continuous basis.

Q. Do you know anything about the business operations of the defendant here, or the company that may have made the listing in 1915?

A. Nothing whatever.

Q. All you know is that the name appears in your telephone book?

A. And on our records.

Q. And they have a telephone number?

A. Yes, sir.

Q. You don't know who made arrangements for that or anything of that kind?

A. We have no information or knowledge on that point.

Mr. Maun: No further questions.

Mr. Abdnor: Nothing further.

Mr. Abdnor: At this time, your Honor, I would like to offer in evidence the file of the Clerk of this Court bearing number 350,303. It is a matter entitled "Northwestern States Portland Cement Company, a corporation, against Rockvile Lumber Company."

Mr. Maun: No objection to this exhibit.

The Court: Received. You admit, do you, Mr. Maun, that this is the same defendant that is here in the court room?

Mr. Maun: No, we do not. We think it is a West Virginia corporation. This is an Iowa corporation. 1

Mr. Abdnor: If that becomes pertinent, then it will be necessary for me to call adverse witnesses for cross examination to demonstrate the relationship between these two. As a matter of fact, the file here involved relates to the West Virginia Corporation in this proceedings.

Mr. Maun: Of course, we were not going to get into a dispute, but if you want to go into that, it is obvious that Mr. Wilkins is not a representative of the West Virginia Corporation, which went out of business in 1934. 2

The Court: What are you trying to prove by this file?

Mr. Abdnor: This file, your Honor, is offered for the purpose of demonstrating that what appears on the face of this file to be this corporation has resorted to the jurisdiction of the Minnesota courts in enforcement of their claims in Minnesota. Now, it will develop that I have cases which demonstrate that that is one factor—possibly a minor factor, but a factor— 3

The Court: You mean this corporation cannot come into our state and use our courts?

Mr. Abdnor: They have taken into consideration the fact that they have come into this state and used our court in their business. It is stated in there that it is the Northwestern States Portland Cement Company of Mason City, Iowa.

1 Mr. Maun: Well, your Honor, the West Virginia corporation was also at Mason City, Iowa. That is on the return. Their first exhibit shows the first year by the West Virginia corporation—

The Court: Was this same company reorganized from one in West Virginia and one in Iowa?

Mr. Maun: That's right. It is a successor corporation to one that came out of bankruptcy.

The Court: All I know is that it is received in evidence. What it amounts to and who it is, that is up to you gentlemen.

2 (Plaintiff's Exhibits V to Z inclusive, and AA and BB were marked for identification.)

Mr. Abdnor: If your Honor please, I now offer in evidence from the Register of the Clerk of this Court—

The Court: What all does this cover?

Mr. Abdnor: Page 260075. It appears to cover matters identified as 259701 to 260200, and I offer that page in evidence.

The Court: Have you seen it, Mr. Maun?

3 Mr. Maun: Yes, I have seen it.

The Court: Do you have any objection?

Mr. Maun: It appears to be a transfer of a judgment from Freeborn County in 1926, and I am sure it is not this company.

The Court: Just because you have the name of a corporation—in this other case you have something to back it up.

Mr. Abdnor: We will withdraw the offer.

Mr. Maun: If I thought it was the same company I would admit it in evidence.

The Court: Well, there may not be very many Northwestern States Portland Cement Companies operating in this state. I would almost take it on that basis. 1

Mr. Abdnor: It seems to me that your Honor could take it on the basis we have here.

The Court: Suppose you had John Smith transferring judgments around. I wouldn't have to take that. It would have to be a very unusual name, and I don't suppose Northwestern States is a very unusual name.

Mr. Abdnor: I will withdraw that, your Honor. I won't make it any more difficult. I think the one file I have in will suit my purposes. 2

The Court: I will put it down "not offered".

Mr. Abdnor: Yes. I offer in evidence Exhibits marked X, Y, Z, AA and BB. Each of these exhibits constitutes a series of documents relating to the registration of a motor vehicle in the State of Minnesota, and each is certified to be true and correct.

The Court: Have they all got his name signed as district manager, or something like that? 3

Mr. Abdnor: No, sir. On the first one, which is Exhibit X, at one point the application is signed by Mr. Danielson, whom, the Court will recall, was the predecessor of Mr. Wilkins, identified as manager. Also, at another point an application is signed by Mr. Wilkins, identified as district manager. These exhibits relate to one particular automobile through the years. With respect to Ex-

hibit Y, it is signed at one point and identified. At one point it is signed by Mr. Danielson, identified as manager. On Exhibit W again, at one point Mr. Danielson has signed, identified as manager. The other exhibits simply show ownership of automobiles in the State of Minnesota.

The Court: Any objections?

Mr. Maun: No objections.

The Court: Received.

Mr. Abdnor: Mr. Maun, I misstated the identification of these exhibits. They should begin with V, W, X, Y, Z and AA and BB.

The Court: All right, they are received.

Mr. Abdnor: Plaintiff rests.

GILBERT BENTON PRAY,

recalled:

DIRECT EXAMINATION.

By Mr. Maun:

Q. You were sales manager during the time Mr. Danielson and Mr. Wilkins worked for the company?

A. That's right.

Q. Were Mr. Danielson or Mr. Wilkins ever given the title as manager, or Twin Cities manager, or regional manager?

A. Well, not in that manner. They were considered as district representatives.

Q. What district?

A. Minnesota, Minneapolis and St. Paul.

Q. Well, you said Minnesota, Minneapolis and St. Paul. Which one did you mean?

A. Minneapolis and St. Paul.

Mr. Maun: No further questions.

Mr. Abdnor: I have nothing.

Mr. Maun: Defendant rests.

Mr. Abdnor: I would like to make a statement for the record. In tax cases of this kind, the State of Minnesota seeks no more and no less than that required by the applicable statute, and if the Court needs any help we will be glad to give any assistance we can with respect to the computations, of course, subject to the approval of the attorney for the defendant in this case.

The Court: I don't know what you mean by that.

Mr. Abdnor: The State wants nothing more than the amount required by the statute. Now, if the Court should find that the State has a right to some tax, but not all the tax—

The Court: How could I find anything different than what is in those figures? You mean if I decide against the company but open it up for that purpose?

Mr. Maun: I agree that if you decide against the company it would be for the figures in the record. Now, your Honor, in a case of this kind I suggest that we be permitted to obtain a transcript and brief the case, and if the Court desires oral argument, either before or after, we would be glad to do that, although I, personally, prefer to have a transcript before we make the argument.

The Court: I agree with Mr. Maun on that. This case is too important to try to do anything until we have had a chance to study the law. There may be some disputed facts in this case which will have to be decided.

Mr. Abdnor: Not to any great extent, but there are some.

The Court: You claim a different rule applies?

Mr. Abdnor: We are not claiming we are bound by the test of whether or not they are doing business in this state. Whether or not they are, we still say we are entitled to a tax.

The Court: But you claim the test is not the same?

Mr. Abdnor: I claim the test as to doing business is not decisive.

Mr. Maun: I would like to have a transcript before I brief the case.

The Court: All right, I will read the briefs, and you can have 30 days after you get the record.

(Title of Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the official court reporter's transcript of the testimony herein consisting of 162 typewritten pages, together with all the exhibits referred in said transcript may be taken as conforming to

the truth and containing all the evidence offered or introduced upon the trial of this cause, all objections, rulings, orders and all other proceedings of such trial (exclusive of the pleadings and other papers properly filed with the Clerk of Court), and that the Court may make an Order herein, upon the motion of either of the parties hereto without notice to the other party, settling and allowing said transcript and exhibits as the settled case herein.

Dated this 12th day of September, 1955.

MILES LORD,
Attorney General,
GEORGE R. JOHNSON,
Assistant Attorney General,
209 State Office Building,
Saint Paul 1, Minnesota,
Attorneys for Plaintiff.

JOSEPH A. MAUN and
WILLIAM R. BUSCH,
BUNDLIE, KELLEY and MAUN,
425 Hamm Building,
Saint Paul 2, Minnesota,
Attorneys for Defendant.

(Title of Cause.)

ORDER SETTLING CASE.

Upon the stipulation of the parties hereto and the Court being fully advised in the premises,

It is hereby ordered that the official court re-

porter's transcript herein consisting of 162 typewritten pages, together with the exhibits referred to therein, may be and the same are hereby settled and allowed as the settled case herein.

Dated at Chambers in Minneapolis, Minnesota, this 14th day of September, 1955.

PAUL S. CARROLL,
Judge of District Court.

(Title of Cause.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action, being on the General Term Calendar of this Court, came duly on for hearing before the undersigned on November 8 and 9, 1954, without a jury, Joseph S. Abdnor, Esq., then Assistant Attorney General, appearing on behalf of the plaintiff at the trial, and Miles Lord, Esq., Attorney General and George R. Johnson, Esq., Assistant Attorney General, appearing on behalf of plaintiff on argument and briefs, and Bundlie, Kelley & Maun by Joseph Maun, Esq., appearing on behalf of defendant on all occasions.

On the trial of this cause the parties adduced evidence in support of their respective contentions, from which the Court hereby makes and files the following

Findings of Fact. 1

I.

That at all times material hereto the defendant, the correct corporate name of which is Northwestern States Portland Cement Company, was a corporation organized and existing under and by virtue of the laws of the State of Iowa, with principal offices and place of business in Mason City, Iowa.

II.

That at all times material hereto the defendant operated on a fiscal year basis with its fiscal year ending on November 30th. 2

III.

That the defendant is not now and was not during the years material hereto authorized under the applicable statutes of the State of Minnesota to transact business in this state and the defendant filed no income tax returns with the Commissioner of Taxation of the State of Minnesota for any of its taxable years here involved. 3

IV.

The plaintiff, acting through the Commissioner of Taxation of the State of Minnesota, prepared on the basis of information available to the said Commissioner of Taxation income tax returns for the defendant for its fiscal years 1933 through 1948, inclusive, and assessed against the defendant the income taxes shown to be due

by said returns. In the preparation of such returns, the Commissioner used the three-factor formula described in Minnesota Statutes 1953, 290.19, in determining the portion of the defendant's overall net income for each of its fiscal years here involved which was to be allocated to Minnesota and subjected to the income tax imposed by this state. The three factors utilized in this formula are (1) the ratio of the taxpayer's sales assignable to Minnesota during the year to its total sales for the year wherever made, (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated, and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year. The income taxes, penalties and interest assessed against the defendant for its fiscal years ended in 1933 through 1948 and herein sought to be collected are as follows:

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	806.48	40.32	512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

V.

That during the years material hereto defendant was engaged in the manufacture and sale of cement. Its home office and plant were located in Mason City, Iowa. It maintained a sales office in the Roanoke Building, Minneapolis, Minnesota, which was operated under a lease paid for from the defendant's home office in Mason City, Iowa. The defendant owned no real estate in Minnesota but did own personal property in this State consisting of office furniture and fixtures, supplies, good will advertising and other material located in its Minneapolis sales office. The office consisted of three rooms and the personal property consisted of three desks, two filing cabinets, a typewriter and some chairs. In addition, the automobiles used by the defendant's salesmen were owned by the company and were located, of course, in the State of Minnesota.

VI.

That during the years material hereto defendant had at the most no more than six employees residing in the State of Minnesota. Two salesmen and a secretary were the employees of the defendant operating out of its Minneapolis sales office. The other employees of the defendant in this state operated directly out of their homes. All were residents of Minnesota. All Minnesota employees of the defendant were hired by supervisory personnel from the defendant's

home office in Mason City, Iowa. No employee of the defendant in the State of Minnesota had at any time any authority to hire or fire any other employee.

VII.

The personal property of the defendant located in the State of Minnesota during the years here involved was paid for out of defendant's home office in Mason City, Iowa. Most of the supplies used in Minnesota by the defendant were obtained from the Mason City office. The defendant's employees in the Minneapolis office did have authority to purchase supplies, such as stamps, etc. That defendant did not maintain a bank account in Minnesota and no petty cash fund was maintained in this state. The salaries of the Minnesota employees were fixed by the Mason City office and paid directly from defendant's home office in Iowa. The defendant's Minnesota salesmen were reimbursed directly from the Mason City office for customer entertainment expense incurred by them. The defendant's employees were on a straight salary basis and vacation policies were established by the home office at Mason City. The territories of the defendant's salesmen in Minnesota were allocated by the home office and the Minnesota employees did not have authority to reallocate the territories among themselves. The defendant maintained two telephone lines in its Minneapolis

office and was listed in both the classified and alphabetical sections of the Minneapolis telephone directory. All telephone bills were paid directly by defendant's Mason City home office. The office was also listed in the Minneapolis city directory. 1

VIII.

That the defendant's employee Wilkins held himself out as and was in fact, the defendant's district manager. That Wilkins was in charge of the Minneapolis sales office. That the defendant's employee Wilkins was listed in the telephone directory and in the city directory as district manager and that applications for automobile license plates were signed by the employee Wilkins as defendant's district manager. That on occasion defendant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles. Such purchases were on bids approved by the home office. 2

IX.

That during the years here involved the Minneapolis sales office of the defendant and was used to some extent as a central office for the Minnesota salesmen and Minnesota customers. That this office was a clearing house for orders that customers telephoned or sent in to this office. It was an office where complaints might be made or inquiries directed. This office was available to the out-state salesmen when they were in Min- 3

neapolis, that is, a place where they might use the telephone or do their work. Also available in this office were advertising supplies such as pencils, pads and blotters for customers.

X.

The orders received by the defendant's salesmen in the State of Minnesota were transmitted daily to defendant's home office in Iowa where they were approved by the home office. The orders received by defendant from its Minnesota salesmen were acknowledged by it from its home office in Mason City directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or mail. The Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit. Credit extensions and collections were handled by the defendant's home office in Mason City. Claims for loss or damage were generally handled through the home office but it was not uncommon for a salesman to handle the adjustment of claims with customers although final approval of the adjustment was necessary from Mason City. Its activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce.

XI.

That the defendant was engaged in selling and delivering cement to Minnesota customers for at least thirty years prior to the commencement of the action here involved. That 48% of defendant's entire sales were made to customers within the State of Minnesota. That the price of defendant's product was the delivered price to the customer. That the defendant endeavored to keep the base price and freight rates separate but in all cases the purchaser paid the price of the product delivered to his place of business and that it was impossible to purchase cement from the defendant except at a delivered price or to pick up defendant's products at defendant's plant or office in Iowa.

XII.

That during the years in question defendant's merchandise was invoiced and shipped by rail from the defendant's home office at Mason City directly to the purchaser. The defendant's purchasers were located in Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin. The defendant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no merchandise was stored or kept by it in this state. Price quotations were prepared and sent out from defendant's home office in Mason City and changes in price were prepared by that office. That by reason of the defendant's location,

it enjoyed a definite competitive advantage over Minnesota cement companies by reason of the favorable freight rates to the defendant by reason of the fact that it was in closer proximity to southern Minnesota customers than such customers were to Minnesota cement producers.

XIII.

That defendant's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the purchase of merchandise, such orders being subject to acceptance, filling and delivery by the defendant from its home office in Mason City, Iowa. That the function of the Minneapolis sales office and all of its employees in addition to soliciting orders for merchandise consisted of a regular and systematic method of contacting potential customers and users of cement products, the promotion and building of good will, the entertainment of customers and the doing of all things necessary to maintain and enlarge the volume of business done by the defendant in the State of Minnesota. Large quantities of defendant's cement products were used for the building of state local highways and such orders sometimes called for forty to fifty thousand barrels of cement and in addition the employees of defendant were required to contact builders, contractors and architects and any other potential user of defendant's products.

XIV.

The defendant's employees in Minnesota, with the exception of the secretary in the Minneapolis office, were all salesmen. That it was their job to sell defendant's products and build good will for the defendant. That defendant would sell only to eligible dealers which are lumber and building material supply dealers, contractors and ready mix companies. That defendant maintained a list of all eligible Minnesota customers in its Iowa office and no matter how an order came into the home office, the company would not sell unless the order had come in from an eligible purchaser. The defendant's salesmen were provided with lists of all eligible purchasers in their territory and were required as a part of their job to call on every potential customer as often as possible. Salesmen in outstate territories call on a customer on an average of every three weeks and in the Twin City district, customers were called on much more frequently.

XV.

That because of the substantial volume of business carried on in Minnesota, there was a steady and continuous flow of defendant's products into the State of Minnesota at all times. That the defendant has maintained its Minneapolis sales office for many years. That defendant's activities in Minnesota are regular, systematic and well

1 organized for the purpose of selling defendant's products.

XVI.

That the defendant predecessor corporation has resorted to the Courts of the State of Minnesota to enforce its contracts on one occasion.

Conclusions of Law.

I.

That this Court does have jurisdiction over the
2 defendant in this action.

II.

That the defendant's employee Wilkins was a proper person on whom to make service of process and, therefore, the service of process was valid to subject the defendant to jurisdiction.

III.

That the assessments against the defendant by
3 the State of Minnesota and the income taxes, penalties and interest which the plaintiff here seeks to collect from the defendant does not contravene the due process clause of either the Fourteenth Amendment of the Federal Constitution or Article I, Section 7, of the Constitution of the State of Minnesota.

IV.

That the assessments against the defendant of the income taxes, penalties and interest which the

State of Minnesota is here seeking to collect from the defendant is not in conflict with or in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States. 1

V.

That the plaintiff is entitled to recovery against the defendant as prayed for in the complaint.

Let judgment be entered accordingly by the Court.

Dated at Minneapolis, Minnesota, this 31st day of August, 1955. 2

PAUL S. CARROLL,
Judge of District Court.

Stay 60 days.

Memorandum

This is a tax case involving the principle of the Drummer cases. The tax itself, passed by the Minnesota Legislature, is Sec. 290.03, M. S. A. I quote the pertinent portion: "An annual tax for each taxable year computed at the rates and in the manner hereinafter provided is hereby imposed upon the taxpayer's net income for such year of the following classes of taxpayers: 1. Domestic and foreign corporations not taxable under Sec. 290.02 which own property within this state or whose business with the state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both." 3

1 Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both. It is definitely not a tax on the franchise of the corporation to do either a local business or an interstate business. Considerable care has been taken in preparing the Findings of Fact because in cases of this kind it often happens that much depends upon the exact Findings of the trial Court. I have tried to cover with a Finding every disputed, or otherwise, question
2 of fact that arose under the testimony.

Defendant claims the tax is unenforceable because Minnesota exceeded her power and denied defendant certain rights under both the Federal and state constitutions. So far as the Federal constitutional questions are concerned, the ultimate authority rests in the decisions of the United States Supreme Court. (See 240 Minn., 71 at page 81.) All the cases, even of the Supreme Court, cannot be reconciled, and to some extent the best one can do in our position is to follow
3 the latest decision. This the Court intends to do. In The Constitution of the United States of America, Revised and Annotated 1952, at page 179 and following there is a discussion of the type of case in question. On page 179 the author quotes from Freeman v. Hewit, 329 U. S. 249, a decision in 1946 by Justice Frankfurter: "The power of the states to tax and the limitations upon that power imposed by the Commerce Clause

have necessitated a long, continuous process of judicial adjustment. The need of such adjustment is inherent in a Federal Government like ours where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent states. The history of this problem is spread over hundreds of volumes of our reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special paths." 1 2

This Court will now consider the claimed defenses in their respective order: 1. Defendant contends that service in this case, which was made on Mr. William R. Wilkins, did not comply with Minnesota Statutes, Sec. 543.08. Wilkins was something more than just a salesman. He called himself the defendant's district manager. That, in itself, did not mean much. But the Court feels that service on him under the circumstances was safe enough to protect the fundamental rights of notice, and so forth, of the defendant. At the oral argument defendant's counsel withdrew this issue, and therefore nothing more need be said about it now. 3

Second, defendant contends that it is not amenable to our courts because it was "not in our state", and, therefore, jurisdiction could not be

obtained, it being a non-resident corporation. This issue involves the question raised in so many cases of a non-resident corporation doing business in another state. Defendant cites the 14th Amendment of the Federal Constitution, and Article I, Section 7 in the Minnesota Constitution. The facts are set out in detail in the Findings. They are sufficient to constitute presence for the purposes of jurisdiction. Forty-eight per cent of defendant's business is done in Minnesota. It was done by regular and systematic solicitation of orders. (In connection with this, as stated by Justice Jackson in Miller Bros. v. Maryland, 347 U. S. 340, "Probably except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject.") As stated in International Shoe Company v. Washington, 326 U. S. 310 (1945), "If the defendant be not within the territory of the forum, he have certain minimum contacts with it so that the maintenance of the lawsuit does not offend traditional notions of fair and substantial justice." Facts which are pertinent to this issue are set out in the Findings, from all of which one reaches the conclusion that Minnesota did have jurisdiction insofar as the 14th Amendment is concerned. Authorities for this result are found in the following cases: 230 Minn. 217; 240 Minn. 71 and particularly a discussion starting on page 80 and continuing to page 87; International Shoe Co. v. Washington, 326 U. S. 310; Nippert v. City of Richmond, 327

U. S. 416; Jurisdictions over Foreign Corporations, 34 Calif. Law Review 331; see also the following: 347 U. S. 340, the 1953 case of Miller Bros. v. Maryland; Alpha Portland Cement, 268 U. S. 203, which, incidentally, is cited later in the Spector case. 1

The third ground raised by defendant is in substance simply this; that Minnesota is attempting to tax on something over which it has no jurisdiction. This is a question of jurisdiction of the thing as distinguished from jurisdiction of the person as raised in point No. 2. An attempt to place a tax on something over which the state has no jurisdiction is a violation of due process and the 14th Amendment and its comparable section in the Minnesota Constitution. This is a tax on net income arising out of business done by the corporation in Minnesota. The levy is fairly proportioned and non-discriminatory. There is no claim that the tax placed an undue or unfair burden on interstate commerce. It is not a tax for use of the highways, nor collected in lieu of ad valorem or property taxes. It is not a fee for inspection, or sales tax. As said in many cases, whether a state may make interstate commerce pay its way depends upon the constitutional channels through which it attempts to go. See Memphis National Gas Co. v. Beeler, 315 U. S. 649, decided in 1942. See also 276 U. S. 245. 2 3

The United States Supreme Court has said in Ott v. Mississippi Barge Line Co. 336 U. S. 169

(1949) with reference to this due process question that a proper test is: Does the tax have any relation to opportunity, benefits, or protection conveyed or afforded by the taxing state? Of course this tax directly relates to the opportunity, benefits and protection conveyed by the State of Minnesota. Minnesota provides a civilized and lawful community into which foreign corporations may come and do business. Courts and police must be maintained, highways kept in repair, and roads built over and under the railroads which haul the defendant's products. The fact that the tax relates to benefits does not alone meet the requirement of due process. A proper apportionment formula is also required. There must be a reasonable reflection of the value of business done in the taxing state. This tax law so provides. Similar taxes have been upheld as against due process. See 329 U. S. 416; 315 U. S. 501; 308 U. S. 331.

If this tax does not violate the Commerce Clause it seems to this Court that Minnesota did have jurisdiction to levy this tax, and it is valid. There are trends in the decisions which make it difficult to be certain what an Appellate Court would do. I base my decision on the following cases: Wisconsin v. Penny Co., 311 U. S. 435 (1940); also 311 U. S. 452; and 303 U. S. 77; Memphis v. The National Gas Co., 335 U. S. 80 (1947); and Memphis National Gas v. Beeler, 315 U. S. 649 and those heretofore cited. On

the basis of these and many other cases I conclude 1
that insofar as due process is concerned, aside from the remaining problem of the Commerce Clause, the tax is valid.

The fourth and last point raised by the defendant is that this law violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. The claim is that this tax is upon a corporation engaged exclusively in interstate commerce and that it is on the defendant's privilege of engaging in interstate commerce in the State of Minnesota, and that therefore it con- 2
stitutes an unreasonable, unlawful and oppressive burden on interstate commerce. There is no question but what the right or privilege of engaging in interstate commerce as such cannot be taxed by a state. See Spector Motor Service supra. It is also true that interstate commerce is, now at least, required to carry its fair share of the burden of taxation in the particular state where it operates. Again, whether a state may validly make interstate commerce pay its way depends, first 3
of all, on the constitutional channel through which it attempts to go. Therefore, the question is, did Minnesota in creating this tax provide a constitutional channel, or did it go through a route which was not constitutional. More particularly, it seems to me, the real issue in this case is whether a tax on a foreign corporation doing a substantial portion of its business in interstate commerce can be levied against the net in-

come of that corporation arising out of business done in the particular state levying the tax. The defendant relies very heavily on the comparatively recent case (1950) of Spector Motor Service Co. v. O'Connor, 340 U. S. 602, and also the older cases cited in the Spector case, to-wit, Alpha Portland Cement v. Massachusetts, 268 U. S. 203, and Cheney Bros. Co. v. Massachusetts, 246 U. S. 147. The State claims that these cases are all cases where the tax is upon the franchise of the foreign corporation but measured in some way by the income of the particular corporation, and the State attempts to draw a distinction between such cases and those where the State levys a non-discriminatory income tax on a foreign corporation, at least on that portion of the business which is done with Minnesota residents. These cases, and particularly the Spector case, hold that the tax is a direct tax on the right of these defendants to carry on an interstate commerce business, and therefore illegal. They do not hold that a fairly apportioned tax on the net income of a corporation doing an interstate business is unconstitutional. The first sentence of the headnote of the Spector case reads as follows: "Connecticut imposes upon the franchises of foreign corporations for the privilege of doing business within the state a tax computed at a non-discriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities in the state." It will be noted

that the tax is upon the franchise or the right to 1
do business, interstate business, and that is something that no state can do. I have not been able to find any case where a non-discriminatory income tax has been held to constitute a violation of the Commerce Clause, nor on the other side of the question have I found one that specifically held that it was not, at least no holding where it was absolutely necessary to a decision in the case. There are several cases where strong statements are made indication that that is the law. The West Publishing Company decision, 27 Calif. 2nd 705, 2
does definitely draw the distinction between a direct tax on the right to do interstate commerce business but payable from a percentage of net income, and a fairly apportioned tax on net income. The California Court did not have to go as far as it did to sustain the tax. The decision was affirmed by the United States Supreme Court in a very short opinion. It can be assumed that it affirmed and approved the result, but to what extent it agreed with the language of that decision I would not know. In Memphis National Gas 3
Co. v. Beeler, 315 U. S. 649, and particularly at page 656, the Court said this: "In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee on the net income of the foreign corporation having a commercial domicile there or upon net income derived from within the state is not prohibited by the Commerce Clause on which alone the tax-

payer relies." This certainly is strong language favoring the State's position. I do not think it was necessary to a decision in this case, and how binding it is I would not know.

The case of Schaffer v. Carter, 252 U. S. 37, and particularly at page 57, certainly uses language that is almost in point on this question favorable to the State. If I correctly read the dissenting opinion of Judge Learned Hand in Spector Motor Service v. Walsh, 139 Fed. 2d 809 at page 822, he affirms the distinction between a direct tax on the right to do interstate business and a tax on some contributing activity. "It seems to me clear that we are therefore not yet justified in supposing that the distinction between an excise upon a Federal activity and an excise upon some contributing activity has ceased to exist." On the other hand, the language of Judge Clark in the main opinion would indicate that unless the Supreme Court changed its position (which it did not), "the tax in the case at bar would be illegal." See page 814. Attention is called to the fact that the Spector case has caused considerable doubt in this field of law, see The Constitution of the United States of America, Revised and Annotated, 1952, at page 209.

The case of United States Glue Co. v. Oak Creek, 247 U. S. 321, holds that the domestic state of a corporation may levy a tax on income of that corporation and include in it income derived from its exclusively interstate business. Now

if this is not a violation of the Commerce Clause —if the local state of the corporation can tax all the income of one of its own corporations, whether derived from interstate commerce or otherwise, then why might not some other state where business was actually done by this corporation in interstate commerce have the same right at least to tax the income from such business derived in and from that particular state. One could be just as much a burden on interstate commerce as the other. Neither is a tax on the franchise itself. See pages 326 and 327 of United States Glue Co. v. Oak Creek supra. I also feel that the case of Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, at particularly pages 695 and 696, furnishes strong support for the State's position. 1 2

This Court has been aided greatly by the written briefs and the oral arguments of both of the attorneys. I have not attempted, by any means, to cite all the cases that this Court has read or that have been cited to the Court. It seems to me, without relying on any particular theory, that the weight of the law, all things considered, favors the holding of constitutionality so far as this [tas] statute is concerned. It is regrettable that this matter has not been settled long, long before this. 3

Let this memorandum be made a part of the foregoing decision in this case.

P. S. C., Judge.

1 (Title of Cause.)

MOTION FOR AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The defendant respectfully moves the Court, for the reasons and on the grounds hereinafter stated, to amend its Findings of Fact, Conclusions of Law and Order for Judgment, entered herein under date of August 31, 1955, in the following particulars:

2

I.

Amend the first two sentences of Finding VIII so that they read as follows:

"That the defendant's employee Wilkins held himself out as defendant's district manager, that Wilkins did this without authority and was at all times material herein employed by defendant only in the capacity of an ordinary salesman."

3 The evidence is clear that Wilkins was nothing more than a salesman and that he was without authority in listing himself as district manager (Tr. 111, 135, 139, 160).

II.

Amend Finding IX so that it reads as follows:

"That during the years here involved the Minneapolis sales office of the defendant was used by defendant's Twin City area

salesmen and its stenographer. This office received and transmitted to defendant's home office in Mason City, Iowa, for acceptance or rejection orders that customers telephoned or mailed in. Small quantities of advertising supplies such as pencils, pads and blotters were available in this office for distribution to customers." 1

The Court's Findings IX, as it now reads, states that the Minneapolis sales office of defendant was used as a central office for defendant's Minnesota salesmen and its Minnesota customers. The testimony, however, is clear that only the Twin City area salesmen of the defendant used this office and that the defendant's other salesmen reported directly to the home office in Mason City (e.g., see Tr. 65). 2

In the Court's Finding IX it is further stated that complaints "might" be made to the Minneapolis office or inquiries directed there. This is contrary to the evidence which clearly reflects the fact that all adjustments for claims or complaints were handled by the home office at Mason City, Iowa, and that defendant's Minnesota employees had no authority to make any adjustments of any kind (see Tr. 54). 3

The Court's Finding IX, as it now reads, also states that the Minneapolis office was available to the out-of-state salesmen when they were in Minneapolis. Nothing, however, is found in either the transcript or the documentary evidence to support this finding.

1 III.

Amend the second to the last sentence of the Court's Finding X so that it reads as follows:

> "Claims for loss or damage were handled through defendant's home office in Iowa and defendant's Minnesota salesmen had no authority to handle or adjust claims of customers."

The Court's Finding X now states that claims for loss or damage were "generally" handled
2 through the home office but that it was not uncommon for salesmen to handle the adjustment of customer claims subject to final approval of the home office. This is contrary to the evidence which clearly reflects the fact that the adjustment of claims was the exclusive responsibility of defendant's home office in Iowa and that defendant's Minnesota employees has nothing whatsoever to do with this activity (see Tr. 54).

IV.

3 Amend Finding XI so that the first sentence thereof reads as follows:

> "That the defendant was engaged in selling and delivering cement in the State of Iowa to Minnesota customers for at least thirty years prior to the commencement of the action here involved."

The requested amendment is necessary to avoid the erroneous implication that defendant

was engaged in selling and delivering merchandise in Minnesota. The evidence is clear that all sales and deliveries made by defendant occurred at its home office in Mason City, Iowa. 1

V.

Amend Finding XV so that the last sentence thereof reads as follows:

> "That defendant's activities in Minnesota were organized and carried on solely for the purpose of drumming up business by the solicitation of orders which were subject to acceptance by defendant at its home office in Mason City, Iowa." 2

This amendment is necessary to conform the finding to the evidence.

VI.

Amend the Conclusions of Law and Order for Judgment so that they read as set forth in the proposed Conclusions of Law and Order for Judgment submitted by the defendant to the Court under date of July 15, 1955. The reasons for this amendment are as set forth in the Memorandum submitted for the Court's use with the aforesaid proposed Conclusions of Law. 3

The foregoing motion will be made upon all the files, records and proceeding herein and such motion is for the purpose of having the Court's Findings of Fact and Conclusions of Law

1 amended to conform with the evidence before the Court.

Respectfully submitted,
JOSEPH A. MAUN,
WILLIAM R. BUSCH,
425 Hamm Building,
Saint Paul 2, Minnesota,
Attorneys for Defendant.

Of Counsel:
BUNDLIE, KELLEY and MAUN,
2 425 Hamm Building,
Saint Paul 2, Minnesota,
SMITH & BECK,
505-509 First National Bank Building,
Mason City, Iowa.

(Title of Cause.)

ORDER FOR AMENDED FINDINGS OF FACT.

3 The defendant in the above entitled action having moved this Court for amended Findings of Fact, Conclusions of Law and Order for Judgment, the matter was placed on the special calendar and came duly on for hearing before this Court in chambers on October 3, 1955, at 10:00 a.m., Bundlie, Kelley & Maun by William R. Busch, Esq., appearing on behalf of the defendant, and Miles Lord, Esq., Attorney General, by George R. Johnson, Esq., Assistant Attorney General, appearing on behalf of the plaintiff.

The Court having heard the arguments of counsel and being apprised in the premises, the Motion is hereby in all respects denied except as hereinafter ordered. 1

It is hereby ordered that the Findings of Fact in the above entitled matter be amended to read as follows:

VIII.

That the defendant's employee Wilkins held himself out as the defendant's district manager and the company had knowledge of this fact. That Wilkins was in charge of the Minneapolis sales office. That the defendant's employee Wilkins was listed in the telephone directory and in the city directory as district manager and that applications for automobile license plates were signed by the employee Wilkins as defendant's district manager. That on occasion defendant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles. Such purchases were on bids approved by the home office. 2 3

IX.

That during the years here involved the Minneapolis sales office of the defendant was used to some extent as a central office for the Minnesota salesmen and Minnesota customers. That this office was a clearing house for orders that customers telephoned or sent in to this office. It was an office where complaints might be made or inquiries directed. This office was available to the

1 defendant's other Minnesota salesmen when they were in Minneapolis, that is, a place where they might use the telephone or do their work. Also available in this office were advertising supplies such as pencils, pads and blotters for customers.

X.

The orders received by the defendant's salesmen in the State of Minnesota were transmitted daily to defendant's home office in Iowa where they were approved by the home office. The or-
2 ders received by defendant from its Minnesota salesmen were acknowledged by it from its home office in Mason City directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or mail. The Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit. Credit exten-
3 sions and collections were handled by the defendant's home office in Mason City. Claims for loss or damage were generally handled through the home office. But it was not uncommon for customers to present their claims to the salesman who writes the company informing it of the trouble and requesting the company what they wish to do about it. Its activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minne-

sota resulted from its operations in interstate commerce. 1

Dated at Minneapolis, Minnesota, this 11th day of October, 1955.

Stay 20 days.

PAUL S. CARROLL,
Judge of District Court.

(Title of Cause.)

AMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT. 2

* * *

The Amended Findings of Fact, the Conclusions of Law, and the Order for Judgment contained herein are hereby filed in lieu of the Findings of Fact, Conclusions of Law and Order for Judgment dated the 31st day of August, 1955.

Let judgment be entered accordingly by the Court. 3

Dated at Minneapolis, Minnesota, this 11 day of October, 1955.

PAUL S. CARROLL,
Judge of District Court.

Stay of 20 days.

1 (Title of Cause.)

JUDGMENT.

The above entitled action, having been regularly placed upon the calendar of the above named Court, came on for trial before the Court, without a jury, on November 8, 1954. Joseph S. Abdnor, Esq., then Assistant Attorney General, appeared on behalf of the plaintiff at the trial, and Miles Lord, Esq., Attorney General, and George R. Johnson, Esq., Assistant Attor-
2 ney General, appeared on behalf of the plaintiff on argument and briefs, and Bundlie, Kelley & Maun by Joseph Maun, Esq., appeared on behalf of defendant on all occasions. The Court, after hearing the evidence adduced at the trial and having been fully advised in the premises, did on the 11th day of October, 1955, duly make and file its Findings of Fact, Conclusions of Law and Order for Judgment therein.

Now, therefore, pursuant to said order and on motion of George R. Johnson, attorney for the
3 plaintiff, Judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $102,536.82 with interest at the rate of 4% per annum on the sum of $70,578.31 from December 1, 1953.

Dated this 4th day of November, 1955.

By the Court,

PHILIP C. SCHMIDT,
Clerk of District Court.

(Title of Cause.)

NOTICE OF APPEAL.

To Miles Lord, Attorney General and George R. Johnson, Assistant Attorney General, State Office Building, Saint Paul, Minnesota, attorneys for plaintiff, and Philip C. Schmidt, Esq., Clerk of the above Court:

Please take notice that Northwestern States Portland Cement Company, a corporation, appeals to the Supreme Court of the State of Minnesota from the judgment of the above Court, and from the whole thereof, dated and entered on November 4th, 1955, in favor of plaintiff and against defendant, in the amount of One Hundred Two Thousand Five Hundred Thirty-six and 82/100 Dollars ($102,536.82) with interest at the rate of four per cent (4%) per annum on the sum of Seventy Thousand Five Hundred Seventy-eight and 31/100 Dollars ($70,578.31) from December 1, 1953.

Dated this 9th day of November, 1955.

JOSEPH A. MAUN.
WILLIAM R. BUSCH.

Of Counsel:
BUNDLIE, KELLEY and MAUN,
Attorneys for Defendant,
425 Hamm Building,
Saint Paul 2, Minnesota.

Associate Counsel:
SMITH & BECK,
505-509 First National Bank Building,
Mason City, Iowa.

Due and personal service of the within Notice of Appeal is hereby admitted this 21st day of November, 1955.

s/ GEORGE R. JOHNSON,
Attorney for Appellee.

Due and personal service of the within Notice of Appeal is hereby admitted this 22nd day of November, 1955.

*s/*PHILIP C. SCHMIDT,
Clerk of District Court.

[fol. 221] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF MINNESOTA

No. 89 Hennepin County

Matson, J.
Dissenting, Frank T. Gallagher, J., Nelson, J.

STATE OF MINNESOTA, Respondent,

36826 v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

SYLLABUS

1. Jurisdictional presence of a foreign corporation is established only if the activities carried on within the forum are of such a quality and nature that it can be said that the foreign corporation has, as a matter of due process, established contacts, ties, or relations within the forum which give rise to privileges and obligations which reasonably obligate it to respond to any suit brought within the forum.

2. Regular and systematic solicitation of business within the state—which results in a continuous flow of the foreign corporation's products into the state through the channels of interstate commerce—when corroborated by other jurisdictionally significant acts or manifestations within the forum, establishes jurisdictional presence in compliance with the requirements of due process.

3. A nondiscriminatory state tax upon the net income of a foreign corporation engaged *solely* in interstate business, which is fairly apportioned to and measured by that part of the net income which is derived from business done within the state, contravenes neither the due process clause nor the commerce clause, *where the incidence or subject of*

the tax is not the privilege of either engaging in, or continuing to engage in, interstate commerce, but is instead those income-producing activities and transactions which, though indirectly related to interstate commerce, have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy the benefits and advantages of, a local business, and which [fol. 222] as localized commerce ought to pay their own way and not place other local business at a competitive disadvantage.

4. The tax imposed under M. S. A. 290.03 not only complies with the requirements of due process but is also not in contravention of the commerce clause since it does not impose a burden upon, or discriminate against, interstate commerce.

5. The annual tax imposed by §290.03 *upon the taxable net income* is not an excise or privilege tax measured by net income, but purely a net-income tax wholly unrelated to the privilege of engaging in interstate commerce.

6. A net-income tax, *the nonpayment of which involves no forfeiture or restriction upon the privilege of engaging in interstate commerce,* places no burden upon interstate commerce where it is levied only upon those interstate commerce transactions which have become localized within the state and have been completed so that the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.

7. Although a net-income tax may not be imposed by a state on the *privilege* of engaging in interstate commerce, the state is not precluded from imposing such a tax upon other activities and aspects of the taxpayer's business which have become localized within the state, even though the payment of such tax comes out of funds derived from the taxpayer's interstate business, provided, however, that the tax is fairly apportioned and the burden thereof is reasonably related to the powers of the state and is nondiscriminatory.

Affirmed.

OPINION—Filed June 14, 1957

Matson, Justice.

Defendant taxpayer, a foreign corporation engaged exclusively in interstate commerce, appeals from a judgment in a proceeding by the State of Minnesota to collect income taxes—together with penalties and interest—upon that portion of the taxpayer's total net income which is allocable to Minnesota. The allocated tax relates to income derived solely from interstate commerce business conducted in [fol. 223] this state.[1]

Three questions are presented on appeal:

(1) Does the taxpayer have sufficient contact with the State of Minnesota to make it amenable to service of process and subject to the jurisdiction of the Minnesota courts?

(2) Is M. S. A. 290.03 in conflict with, and thus invalid and void under, the due process clause of U. S. Const. Amend. XIV, and Minn. Const. art. 1, §7, insofar as it imposes a tax on that portion of the net income of a foreign corporation arising out of sales assignable to and activities conducted within Minnesota?[2]

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[1] This decision comes to the writer by reassignment.

[2] Section 290.03 reads as follows:

"An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in

(3) Is §290.03 in conflict with, and thus invalid and void under, the commerce clause, U. S. Const. art. I, §8, [fol. 224] clause 3, insofar as it imposes a tax on that portion allocable to the taxing state of the net income of a foreign corporation whose business within the taxing state consists exclusively of interstate commerce?[3]

Taxpayer is an Iowa corporation engaged in the manufacture and sale of cement; its principal office and place of business is at Mason City, Iowa. Although the taxpayer maintains an office in Minneapolis and employs several representatives within the state who regularly and systematically solicit orders for the taxpayer's product, the taxpayer has never qualified under M. S. A. 303.03 as a foreign corporation authorized to transact business within this state.

Although in the course of its business in interstate commerce the taxpayer has for over 30 years systematically marketed a substantial part of its products in Minnesota, it has never filed income tax returns in this state. On refusal of the taxpayer to file income tax returns for the fiscal years 1933 through 1948 as required under §290.03, the commissioner of taxation prepared returns on the

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work within this state for more than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and,

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

[3] For convenience in comparing §290.03 with §290.02, the latter section is set forth below:

"An annual tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

"The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter."

basis of the best information available to him, filed these returns for the taxpayer, and assessed against the taxpayer the income taxes shown to be due by the returns. In [fol. 225] the preparation of the returns, the commissioner used the three-factor formula prescribed by §290.19 to determine what portion of the taxpayer's total net income should be allocated to Minnesota and subjected to the income tax imposed by this state. The following application of the formula defines each of the three factors and illustrates the result of their employment in determining the portion of the taxpayer's net income allocable to Minnesota for the year ending November 30, 1948:

(1) The ratio of the taxpayer's sales assignable to Minnesota to its total sales for the year wherever made	48.4493	percent
(2) The ratio of the taxpayer's total tangible property in Minnesota to its total tangible property used in the business that year wherever situated	.1142	percent
(3) The ratio of the taxpayer's total payroll in Minnesota to its total payroll for the entire business.	1.6484	percent
Total	50.2119	percent
Arithmetical Average	16.7373	percent

The percentages for the three factors were added together for a total of 50.2119 percent and then divided by 3 to give the final arithmetical average of 16.7373 percent which represents the percentage of taxpayer's income allocable to Minnesota for the 1948 fiscal year.* The average percentage when applied to taxpayer's 1948 total net income of $852,897.74—after first deducting therefrom $12,667.57 for nonapportionable income arising from inter-

* The 1948 fiscal year represents the year ending November 30, 1948.

est and rents derived from property located outside Minnesota—shows for that year as apportionable to Minnesota a taxable net income of $140,631.84. Upon this latter sum of income, which is allocated to Minnesota pursuant to the three-factor formula, the commissioner assessed a tax of $8,370.53 plus certain penalties and interest. Total taxes, penalties, and interest assessed for the fiscal years 1933 to 1948 are $102,536.82.

[fol. 226] I

Was Taxpayer Amenable to Jurisdiction of Minnesota Court?

1. We turn to the first issue to ascertain whether the taxpayer was juridically present in this state as to be amenable to the jurisdiction of our courts. Whether a foreign corporation domiciled in another state is jurisdictionally present so as to be subject to the jurisdiction of the Minnesota courts depends in each case upon the quality and nature of the activities which it carries on within our state.[5] What activity or combination of activities are necessary to constitute jurisdictional presence[6] of a foreign corporation domiciled elsewhere, in order to comply with the due process clause of Amend. XIV, cannot be summarized so as to provide an arbitrary test for all cases. Each case must be determined on its own peculiar facts to ascertain whether the corporation has carried on activities of such a quality and nature that it can be said that it has, as a matter of due process, established contacts, ties, or relations within the forum which give rise to privileges and obligations which reasonably obligate it to respond to any suit brought within the forum.

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[5] See, Schilling v. Roux Distributing Co. Inc., 240 Minn. 71, 59 N.W. (2d) 907; Hartmon v. National Heater Co., 240 Minn. 264, 60 N.W. (2d) 804; Continental C. & S. Management, Inc. v. American Broadcasting Co., 230 Minn. 217, 41 N.W. (2d) 263; Dahl v. Collette, 202 Minn. 544, 279 N.W. 561; Hutchinson v. Chase & Gilbert (2 Cir.), 45 F. (2d) 139.

[6] The symbolic terms *present* and *presence* as applied to a foreign corporation in ascertaining if state courts have jurisdiction has been ably discussed in Hutchinson v. Chase & Gilbert, *supra*, and in Schilling v. Roux Distributing Co. Inc., *supra*, and, therefore, need no discussion here.

[fol. 227] 2. Without determining whether regular and systematic solicitation of business within the state—which results in a continuous flow of the corporation's products into the state through the channels of interstate commerce—alone and of itself—constitutes jurisdictional presence we need not here determine. It is clear, in any event, however, that such regular and systematic solicitation, when corroborated by other and additional corporate acts or manifestations within the forum, does establish jurisdictional presence in compliance with the requirements of the due process clause. We need not here attempt to define what other acts are sufficient to furnish corroboration since in the present case the corroborative acts are both abundant and jurisdictionally significant. The taxpayer herein not only has regularly and systematically solicited business which has brought through the channels of interstate commerce a continuous flow into this state of its products, but as a further indication of its presence it has systematically carried on many additional activities and services which are summarized in the following four paragraphs.

Factual Summary of Taxpayer's Activities in Minnesota

We turn to the facts as found by the trial court and as sustained by the evidence. For the convenience of its salesmen and customers, the taxpayer rents and maintains in Minneapolis an office which is used to some extent as a central office and serves as a clearinghouse for orders and complaints. A full-time secretary is employed in this office; two telephone lines are maintained; and it is listed in both telephone (alphabetical and classified indexes) and city directories. One of the district representatives is in charge of this office and, with the taxpayer's knowledge, holds himself out as district manager. In addition to office [fol. 228] equipment, goodwill advertising and other material, taxpayer owns the automobiles driven by its Minnesota salesmen.

Taxpayer employs five sales representatives in Minnesota, two of whom work out of the Minneapolis office. The salesmen regularly and systematically solicit orders from eligible purchasers—building supply dealers, ready-mix operators, and large contractors. In addition, the salesmen

regularly and systematically contact potential customers and users of cement products (inclusive of architects and building and road contractors) to induce them to buy from taxpayer's established local outlets and dealers, promote goodwill and furnish advertising materials to customers, entertain customers, and occasionally receive and forward complaints. *The flow of taxpayer's products into Minnesota constitutes about 48 percent of its sales volume.*

All taxpayer's Minnesota employees are hired by supervisory personnel from its Mason City office, and no Minnesota employee has authority to hire or fire. Salesmen's territories are assigned by the Mason City office, and vacation schedules are established there. All orders are subject to acceptance by the office in Mason City, and credit extensions and collections are handled there, the salesmen having no authority to accept orders or extend credit.

The price of taxpayer's cement products is the delivered price to the customer, the sum of the base price plus the freight plus the package. Accordingly, the products are invoiced f. o. b. destination. Freight is prepaid by the taxpayer, and in no case can the customer purchase cement from taxpayer except at a delivered price nor, since taxpayer has no facilities for loading trucks, can the customer pick up cement at taxpayer's plant. Quotations giving both base and delivered price are sent directly to the customer from the Mason City office. Although the salesmen have no authority to give the customer a quotation, they do carry a rate book from which they regularly compute the [fol. 229] delivered price to the customer without a quotation. On the request of one of taxpayer's dealers, quotations for specific projects are sent from Mason City to the contractor. Such a quotation cites the dealer's price (f. o. b. dealer's warehouse) to the contractor.

II

Tax Does Not Violate Due Process Clause

3. The imposition of a net-income tax under §290.03 upon that portion of the taxpayer's net income which is allocated to Minnesota under the three-factor formula of §290.19 is not unconstitutional as violating the due process

clause of U. S. Const. Amend. XIV, or that of Minn. Const. art. 1, §7. A nondiscriminatory[7] state tax upon the net income[8] of a foreign corporation engaged *solely* in interstate business, which is fairly apportioned[9] to and measured by that part of the net income which is derived from business done within the state, contravenes neither the due process clause nor the commerce clause, where the incidence or subject of the tax is not the privilege of [fol. 230] either engaging in, or continuing to engage in, interstate commerce, but is instead those income-producing activities and transactions which, though indirectly related to interstate commerce,[10] have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy the benefits and advantages of, a local business, and which as localized commerce ought to pay their own way and not place other local business at a competitive disadvantage.[11]

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[7] See, United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328, 38 S. Ct. 499, 501, 62 L. ed. 1135, 1141, Ann. Cas. 1918E, 748, 750; Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87, 88, 68 S. Ct. 1475, 1478, 1479, 92 L. ed. 1832, 1839, 1840; Peck & Co. v. Lowe, 247 U.S. 165, 174, 38 S. Ct. 432, 434, 62 L. ed. 1049, 1052; Atlantic Coast Line R. Co. v. Daughton, 262 U.S. 413, 422, 43 S. Ct. 620, 623, 67 L. ed. 1051, 1060; 1953 Wash. U. L. Q. 233, 255.

[8] See, Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165; United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 329, 38 S. Ct. 499, 501, 62 L. ed. 1135, 1141, Ann. Cas. 1918E, 748, 750.

[9] See, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256, 58 S. Ct. 546, 549, 82 L. ed. 823, 828.

[10] See, Atlantic Coast Line R. Co. v. Daughton, 262 U.S. 413, 422, 43 S. Ct. 620, 623, 67 L. ed. 1051, 1060; West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861; Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 155, 38 S. Ct. 295, 297, 62 L. ed. 632, 637.

[11] See, International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 349, 64 S. Ct. 1019, 1023, 88 L. ed. 1313, 1319; Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S. Ct. 325, 83 L. ed. 272; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 259, 58 S. Ct. 546, 550, 82 L. ed. 823, 830; 1953 Wash. U. L. Q. 233, 242, 243, 253; 56 Dickinson L. Rev. 107, 109, 110; McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. ed. 565, 128 A. L. R. 876.

Taxpayer's Localized Activities and Transactions Within State Satisfy Requirements of Due Process

We can only conclude that the taxpayer has sufficient factual connections with localized activities and transactions within the state to comply with the requirements of due process. As already noted, the taxpayer maintains within the state several resident representatives who regularly and systematically solicit orders which are forwarded to the corporation's principal business office in the adjoining state for acceptance or rejection. These representa- [fol. 231] tives, in addition to soliciting orders, entertain customers and furnish them with information, receive and forward their complaints, and furthermore, *contact prospective users of cement (inclusive of architects and building and road contractors) to induce them to buy cement through and from the taxpayer's established local outlets or dealers.*[12] In addition, the taxpayer maintains a local service office, permits its office manager and representative to hold himself out as its district representative, and otherwise engages in the many additional local activities *hereinbefore enumerated in a factual summary of taxpayer's activities in Minnesota.*

Taxpayer Receives Extensive Benefits of State Governmental Services and Enjoys the Protection of the State Courts

Clearly, this is not a case where a state reaches beyond its borders and fastens its tax talons upon an event having no factual connection with transactions within its borders whereby it is unable to confer anything in return for the exaction.[13] Here instead the taxpayer is present through its extensive localized activities and enjoys, in return for any taxes exacted, the opportunities, protection, and benefits of a modern community serviced by a state government

[12] See, Norton Co. v. Dept. of Revenue, 340 U.S. 534, 539, 71 S. Ct. 377, 381, 95 L. ed. 517, 521. An analogous situation arose with respect to the Northwestern Consolidated Milling Company in Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 155, 38 S. Ct. 295, 297, 62 L. ed. 632, 637.

[13] See, Hartman, State Taxation of Interstate Commerce, p. 117.

which maintains courts, police, roads, and other services of distinct advantage to the building and maintenance of the taxpayer's tremendous sales volume (48 percent of its total sales volume) through business outlets within the state. It is not amiss to observe that the taxpayer, or its immediate predecessor under a prior incorporation, has already had occasion to seek the benefit and protection of our courts.

[fol. 232] III

Final Issue—Not in Contravention of Commerce Clause

4. The tax imposed under §290.03 not only complies with the requirements of due process but is also not in contravention of the commerce clause since it does not impose a burden upon, or discriminate against, interstate commerce. Tax enactments violate the commerce clause when they either profess to regulate interstate commerce, or affect it so directly as to amount to a regulation, or discriminate against it so as to place it at a disadvantage with intrastate commerce.[14] In the present case we have a net-income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against the free flow of interstate commerce.[15] It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative intent, or by operative effect be construed or classified as an excise, franchise, or privilege tax. It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes.* In this respect it involves no regulation of, or burden upon, interstate commerce.[16]

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[14] See, McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. ed. 565.

[15] Altman & Keesling, Allocation of Income in State Taxation, p. 29.

[16] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165.

[fol. 233] *Statutory Language Precludes an Intent to Impose an Excise Tax or Privilege Tax*

5. A comparison of §290.02 with the section with which we are here directly concerned, namely §290.03, is enlightening in disclosing the true nature of the tax.[17] An examination of these sections discloses a clear distinction between the excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the state and the income tax imposed under §290.03. First, the arrangement of the statute is indicative of the legislature's intention to differentiate between these two types of taxes: §290.02 imposes an excise tax, but §290.03 imposes purely an income tax. That the *annual tax* imposed by §290.03 upon the *taxable net income* is not an excise or privilege tax measured by net income, but purely a net-income tax wholly unrelated to the privilege of engaging in interstate commerce, becomes clear when we consider the character of the specifically designated types of taxpayers to which it equally and uniformly applies. Clearly, paragraphs (1), (2), (3), and (4) of §290.03 must be construed together since they relate to the imposition of the same kind of tax on four different classes of taxpayers, namely, on domestic and foreign corporations engaged exclusively in foreign or interstate commerce under paragraph (1); on resident and nonresident individuals under paragraph (2); on estates of decedents dying domiciled within or without the state under paragraph (3); and on trusts created by resident or nonresident persons or by domestic or foreign corporations under paragraph (4). Since the annual net-income tax imposed on individuals under paragraph (2) cannot by any legal legerdemain be construed as an excise or privilege tax, the same yardstick of meaning must be applied to the tax imposed under paragraph (1) upon foreign corporations engaged exclu- [fol. 234] sively in interstate commerce. A similar comparison of paragraphs (3) and (4) with paragraph (1) corroborates this conclusion.

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[17] For convenience in making a comparison, the two sections, §§290.02 and 290.03, are set forth in full in footnotes 2 and 3.

Secondly, the distinction in the nature of these taxes is further emphasized by the provisions of §290.04, subd. 1, which establishes that liability for the excise tax—although measured by income—arises on the first day of the taxable year, while liability for the income tax arises concurrently with the receipt or accrual of income during the taxable year.

Tax Is Nondiscriminatory and Subject to Judicial Review

The tax is also nondiscriminatory. *It applies equally to all taxpayers, resident or nonresident, and whether they are engaged in either interstate or intrastate commerce. Significantly Minnesota, in dealing with resident and domestic taxpayers located within its borders and doing business partly within and partly without the state, imposes the tax only on that portion of the income allocable to earnings produced within this state.* As applied to nonresident taxpayers engaged in interstate commerce, it is confined to that portion of their income earned from business activities which are fairly apportioned to, and localized within, the state. It is not an arbitrary imposition since the taxpayer has the opportunity of voluntarily preparing and filing his own tax return according to the information which he himself possesses. If any error is thought to occur in the levy, measure, or the amount of the tax as based on his own return, or upon a return prepared for him by the tax commissioner, he may, like any resident taxpayer, petition the state Board of Tax Appeals for relief and after that he has a further right of appeal to this court.

Tax Is Fairly Apportioned to Intrastate Net-Income Sources and Does Not Impose a Multiple Tax Burden on Interstate Commerce

Taxpayer contends that the tax before us is invalid for the reason that it imposes a multiple tax burden upon its interstate business. Although a tax imposed upon gross [fol. 235] receipts or other incidents may be invalid for

this reason where not fairly apportioned,[18] such a tax is not invalid if it is fairly *apportioned* to the commerce carried on within the taxing state. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823. Likewise, a tax imposed upon net income, if fairly apportioned to sources derived from within the taxing state, does not contravene the requirement of due process even though the taxpayer may be domiciled in another state.[19] Moreover, as hereinafter shown, such a tax does not violate the commerce clause although the income or a part of the income taxed is derived from interstate commerce.[20] The tax before us now is a tax upon net income and it is fairly apportioned to the net profit derived from taxpayer's business activities carried on in this state. It is therefore not invalid as imposing a multiple burden upon taxpayer's interstate business.

[fol. 236]

Mere Possibility That Iowa May Attempt to Tax Entire Income of Taxpayer Does Not Invalidate Minnesota Tax

We have, however, the suggestion, although there is no support for it in the record, that Iowa, as the domiciliary

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[18] Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913, 82 L. ed. 1365; Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S. Ct. 325, 83 L. ed. 272; Case of State Freight Tax, 82 U.S. (15 Wall.) 232, 21 L. ed. 146; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L. ed. 823.

[19] Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165; New York ex rel. Whitney v. Graves, 299 U.S. 366, 57 S. Ct. 237, 81 L. ed. 285; Altman & Keesling, Allocation of Income in State Taxation, p. 29.

[20] United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165; Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Altman & Keesling, Allocation of Income in State Taxation, p. 29.

state, may attempt to impose a tax upon taxpayer's entire net income wherever earned. Most states, including Minnesota, however, permit their domiciliaries to apportion the net income derived from sources within the state and thereby excuse payment of a tax on net income derived from out-of-state sources.[21] Where, however, a domiciliary state does not voluntarily permit the apportionment of the total net income of the taxpayer, the United States Supreme Court has, by its treatment of a potential double tax burden in another situation, indicated that it may require the domiciliary state to permit apportionment. In the analogous situation the court, in dealing with an ad valorem tax, has held that a state other than the corporate domicile may impose a tax on the taxpayer's instrumentalities utilized in interstate commerce. Where, however, a tax is imposed by two or more states on an apportionment basis, the court declared that the *domiciliary* state is precluded from taxing all of taxpayer's property.[22] If the domiciliary state is required to apportion in the case of an ad valorem tax, there is no reason why it may not be required to do so with respect to a tax imposed upon taxpayer's net income.

A Net-Income Tax Is Not a Burden on Interstate Commerce

6. Clearly, a net-income tax places no burden upon interstate commerce. *The tax is levied after the interstate* [fol. 237] *commerce transactions localized within the state have been completed, and after all expenses are paid and losses adjusted, and after the taxpayer, as the recipient of the remaining net income, is free to use it as he chooses. Thus the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.* See, Peck & Co. v. Lowe, 247 U. S. 165, 175, 38 S. Ct. 432, 434, 62 L. ed. 1049, 1052. No longer may it be doubted that a tax may be levied on net income derived wholly from operations in

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[21] Altman & Keesling, Allocation of Income in State Taxation, p. 31; M. S. A. 290.19.

[22] Standard Oil Co. v. Peck, 342 U.S. 382, 72 S. Ct. 309, 96 L. ed. 427; Braniff Airways v. Nebraska Board, 347 U.S. 590, 74 S. Ct. 757, 98 L. ed. 967.

interstate commerce, although a tax on that commerce is forbidden.[23]

In McGoldrick v. Berwind-White Co., 309 U. S. 33, 46, 60 S. Ct. 388, 392, 84 L. ed. 565, 570, 128 A. L. R. 876, 880, the court said:

> "* * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation."

Spector Motor Service Decision Distinguished

7. Taxpayer contends, however, that since the rendition of the decision in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573, no tax, even though it be fairly apportioned and nondiscriminatory, may be levied on the net income of a foreign corporation engaged *exclusively* in interstate commerce. It is the position of the taxpayer that such a tax may be levied only in those [fol. 238] cases where the foreign corporation is engaged in both intrastate and interstate commerce. We cannot agree

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[23] United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U.S. 37, 57, 40 S. Ct. 221, 227, 64 L. ed. 445, 459; see, McGoldrick v. Berwind-White Co., 309 U.S. 33, 47, 60 S. Ct. 388, 392, 84 L. ed. 565, 570, 128 A. L. R. 876, 880; Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 656, 62 S. Ct. 857, 862, 86 L. ed. 1090, 1097; West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861.

with this interpretation of the Spector case. The Spector case did not turn on the fact that the foreign corporation was *solely* engaged in interstate commerce. The nub of the decision is that a net-income tax, even though it be fairly apportioned and nondiscriminatory, may not be imposed on the *privilege* of engaging in business that is exclusively interstate in character. The Connecticut Supreme Court construed its statute as involving a direct imposition of the tax upon the *franchise or privilege* of engaging in interstate commerce. The United States Supreme Court clearly accepted this construction as controlling its interpretation. This is not unusual. In Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 84, 85, 68 S. Ct. 1475, 1477, 92 L. ed. 1832, 1838, the court expressly declared that it was bound by the construction of a state statute by the state court. Although the United States Supreme Court has on occasion looked behind a state court's holding that a tax is not a burden upon interstate commerce, *it has not done so where the state court has by its construction admitted or declared the tax to be a burden upon that commerce.* Since the incidence of the tax in the Spector case was the *privilege* itself of engaging in interstate commerce, it fell before the commerce clause. The court carefully distinguished those cases in which, as an exception to the general rule that no tax may be levied upon the *privilege* of engaging in interstate commerce, a state, where a taxpayer is engaged in both intrastate and interstate commerce, is permitted to tax the *privilege* of carrying on intrastate business and, within reasonable limits, is permitted to apply a fair proportion of the tax to the taxpayer's business which is done within the state. The court refused to extend the application of these hybrid cases to a taxpayer, like Spector, who is engaged exclusively in interstate commerce. The majority expressly stated that (340 U. S. 610, 71 S. Ct. 513, 95 L. ed. 579) "the federal *privilege* of carrying on exclusively interstate commerce" must be kept "free from state taxation." (Italics supplied.)

[fol. 239] The court, in the Spector case, carefully pointed out that whether a state may validly make interstate commerce pay its own way depends first of all upon the constitutional channel through which it attempts to do so, citing Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265, and McLeod v. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023, 88 L. ed. 1304. Apparently in an effort to prevent misunderstanding of the rule of its holding, and for the purpose of indicating that a constitutional channel is available to the states, the court said (340 U. S. 609, 71 S. Ct. 512, 95 L. ed. 578):

> "• • • *The State is not precluded from imposing taxes upon other activities or aspects of this business* which, unlike the *privilege* of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." (Italics supplied.)

It follows that the Spector decision makes it reasonably clear that there is a constitutional channel for making interstate commerce pay its own way and that this channel gives the state a right to impose taxes upon other activities and aspects of the interstate commerce business which, unlike the *privilege* of doing interstate business, are subject to the sovereign power of the state despite the fact that such taxes may be derived out of income from interstate business.

Alpha Portland Cement Co. Decision Distinguished

The Spector decision, in support of its holding that a state may not tax the *privilege* of carrying on a business that is exclusively interstate in character, cites Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916, wherein an attempt was made to impose an excise tax upon the *privilege* of engaging in a business solely interstate in character. The Alpha case does nothing

more than emphasize the rule that taxes upon the *privilege* of doing interstate business violate the commerce clause.

[fol. 240] *Cheney Brothers Co. v. Massachusetts Supports Validity of Tax Herein*

In Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. ed. 632 (cited in the Alpha case), involving consideration of the validity of an excise tax imposed upon seven foreign corporations, each differently situated, we have a good illustration of the principle that a state may impose a valid tax if the proper constitutional channel is selected. One of the foreign corporations involved therein was the Northwestern Consolidated Milling Company, which, like the instant taxpayer, had localized its business within the state. In upholding the validity of the tax upon this corporation, the court said (246 U. S. 155, 38 S. Ct. 297, 62 L. ed. 637):

> "This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. *Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another,*—and may be taxed by the State, regardless of the motive with which it is conducted." (Italics supplied.)

In the case at bar we also have salesmen who call upon the users of cement to induce them to give their business to the local dealers who handle the taxpayer's product.

West Publishing Co. v. McColgan Similarly Distinguishes Spector and Alpha Cases and Supports Validity of Income Tax on Foreign Corporations Where Net Income Is the Subject as Well as the Measure of the Tax

That our interpretation of the Spector and the Alpha cases is correct is further illustrated by a comparatively recent decision involving facts substantially similar to those of the case at bar, namely, West Publishing Co. v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861. The West case [fol. 241] has been well summarized as follows:

> "* * * this company was in the law book publishing business, a Minnesota corporation. The company shipped books and other publications into California pursuant to orders taken by its salesmen who devoted their full time to their jobs in California. These employees had space in lawyers' offices in exchange for the use of books stored there. The California employees were authorized to and did receive payments on orders, collected deliquent [sic] accounts and made adjustments on complaints of customers.
>
> "The State of California cognizant of the fact that a state may not exact a tax for the *privilege* of doing an exclusively interstate business, imposed an income tax on those corporations not subject to its franchise tax. It made net income the subject as well as the measure of its *Corporation Income Tax*. It limited the measure of the tax to income from California sources which was understood to mean income from sources of books and periodicals delivered in California. The California Supreme Court sustained the assessment holding that 'a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce does not conflict with the commerce clause.' The U. S. Supreme Court unanimously affirmed this decision by a *per curiam* opinion." (Italics supplied.)[24]

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[24] Kraus, *The Implications of the Spector Motor Service Case*, 56 Dickinson L. Rev. 107, 112.

Comparison of West With Spector and Alpha Decisions

In the Spector and Alpha cases, both involving foreign corporations engaged exclusively in interstate commerce, the tax was held invalid because it was imposed directly on the *privilege* of doing that business. In the West case, however, the tax was valid because it was a tax on the net income from business localized within the state and not a tax on the *privilege* of engaging in interstate commerce. In connection with the West case, it is significant to note [fol. 242] that the California statutory scheme of taxation is similar to that of Minnesota. See Appendix at the end of this opinion.[25]

In the light of the intent, as well as the carefully restricted impact, of our state statutes, as applied to taxpayer's extensive localized activities within Minnesota, we can only conclude that the net-income tax imposed under §290.03, pursuant to the decisions of the United States Supreme Court, does not contravene the due process clauses of either the Federal or the State Constitutions and does not conflict with the commerce clause.

The trial court is affirmed.

Affirmed.

LEROY E. MATSON

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[25] The relatively recent Pennsylvania Supreme Court decision in Commonwealth v. Eastman Kodak Co., 385 Pa. 607, 124 A. (2d) 100, is neither controlling nor in point. In that case the incidence of the tax was held to be the franchise or privilege of doing interstate commerce. The Kodak Company did not maintain a service office within Pennsylvania for the convenience of its customers and salesmen. Furthermore, the Kodak Company did not have a local manager; did not contact prospective users of its products to persuade them to patronize its local dealers; and did not, in any material degree, carry on the systematic local activities characteristic of the taxpayer herein. In the instant case the taxpayer is present in Minnesota through its extensively localized activities and these activities—unlike those in the Pennsylvania case—provide the necessary incidence for the tax.

[fol. 243] APPENDIX TO OPINION

In connection with the West decision, it is interesting to note that California's statutory scheme of taxation under its Corporation Income Tax Act of 1937 and Bank and Corporation Franchise Tax Act is very similar to Minnesota's. The California statute provides:

> "There shall be levied, collected and paid for each taxable year, a tax * * * upon the net income of every corporation derived from sources within this State * * *. Income from sources within this State includes income from tangible or intangible property located or having a situs in this State and income from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce." Calif. Stat. 1937, c. 765, §3.

The act excepts from its provision any income included in the measure of the corporate excise tax. The California Supreme Court's determination that the tax as valid was affirmed by the Supreme Court of the United States. West Publishing Co. v. McColgan, 27 Cal. (2d) 705, 166 P. (2d) 861, affirmed, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603.

On the other hand, Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573, was concerned with the construction of a statute which, on its face, professed to impose an excise tax for the privilege of transacting business within the state. The Connecticut Corporation Business Tax Act of 1935 imposed, with certain exceptions not involved here, on every corporation carrying on business within the state—

> "* * * a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income * * * received by such corporation * * * from business transacted within the state * * *." Conn. Cum. Supp. to Gen. Stat. 1935, §418c.

[fol. 244] NELSON, Justice (dissenting).

I respectfully dissent from the conclusions reached in the majority opinion on defendant's tax liability.

It is undisputed that the taxpayer is an Iowa corporation domiciled in that state; that its business is the manufacture and sale of cement and cement products; and it maintains its home and principal business offices, as well as its manufacturing plant, at Mason City, Iowa.

Taxpayer has never qualified under M. S. A. 303.03 as a foreign corporation authorized to do business in the State of Minnesota, nor does the record indicate that the state has ever demanded such qualification or compliance with that statute. There is no indication from the record that this state could demand such compliance nor that it could deny defendant the right to freely engage in interstate commerce within its borders.

Taxpayer admits that, while engaged in interstate commerce in the manufacture and sale of its products, it has over a period of approximately 30 years found a market for a large amount of its products in Minnesota, but alleges that it has operated in the same manner in Iowa, Nebraska, North Dakota, South Dakota, and Wisconsin. Taxpayer has never filed income tax returns in this state. The state commissioner of taxation determined to claim part of the income earned by taxpayer as taxable by Minnesota, and upon taxpayer's refusal to file returns, he prepared the returns in his own office on the basis of information available to him and caused them to be filed.

The commissioner used the so-called three-factor formula described in §290.19 in determining the portion of defendant's overall net income which was to be allocated to Minnesota and subjected to the income taxes imposed by this state. The three factors specified pursuant to the statutory formula were: (1) The ratio of the taxpayer's sales made in Minnesota during the year to its total sales for the year wherever made; (2) the ratio of the taxpayer's total tangible property used in the business that year to [fol. 245] the total tangible property wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year.

The figures arrived at in the commissioner's returns were demanded from taxpayer under §290.03 and Minnesota Income Tax Regulations, Reg. 2003(1), as applicable to income

tax on corporations.[26] The total alleged tax deficiency, if collectible, is not in dispute.

During the relevant business years taxpayer maintained only one office in this state. That office, located in Minneapolis, was occupied under a lease negotiated and paid for from the home office at Mason City, Iowa. Taxpayer did not own or occupy a warehouse or storage or manufacturing plant in this state. It owned no real estate here, and its only personal property in this state was its salesmen's automobiles, its office furniture, and a small amount of supplies and good will advertising material. The Minneapolis office was a sales office where taxpayer's salesmen met customers. The office consisted of three small rooms and contained three desks, two filing cabinets, a typewriter, and some chairs. All personal property including salesmen's automobiles and office supplies except postage stamps were requisitioned from the home office and were bought and paid for there.

During the years involved five salesmen were employed in this state. Two operated from the Minneapolis office and the other salesmen operated directly out of their homes at different points in the state. The only other employee was a secretary who worked at the Minneapolis office. All these employees were hired by supervisory personnel at tax- [fol. 246] payer's home office. At no time did any of the above employees possess or exercise authority to hire or fire other employees, nor did the employees have authority to purchase supplies other than postage stamps. Taxpayer did not maintain a bank account in this state, and all salaries paid Minnesota employees were fixed by the sales manager at Mason City and paid directly from the home office. Territories for each salesman were allocated at the

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[26] Reg. 2003(1) of Minnesota Income Tax Regulations 1955 (income tax on corporations) provides:

"All corporations, domestic or foreign, whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M. S. A. 290.03(1). This provision requires the imposition of a tax on the net income from interstate commerce or foreign commerce assignable to Minnesota."

home office, and no salesman had authority to reallocate. Customer entertainment expenses incurred in this state were paid directly from the home office. Employees were compensated by salary only, without provision for commissions.

The sales procedure was one of solicitation and taking orders. The salesmen received the buyer's order which they forwarded to the home office. There the order was examined before acceptance. Buyer's credit was subject to home office approval. If the order was accepted, the buyer was sent an acknowledgment from the home office and the cement product shipped directly to the buyer by rail, f. o. b. Mason City, Iowa. All merchandise was invoiced and shipped from Mason City directly to the buyer. All price quotations and changes thereof were sent directly to the customer from the home office. Prices were quoted at millsite rate at Mason City, Iowa, plus, for the buyer's convenience, the freight to the buyer's place of business. The salesmen were required to transmit all orders received to the home office daily. All contracts were executed at the Mason city office and then sent directly to the customer. Credit extensions and collections were handled only at the home office. The salesmen were without authority to accept or reject a customer's order or to approve his credit. The buyer's claim for loss or damage was handled only by the home office. Any claims presented to the salesmen were transmitted to the home office for disposition. The authority of the salesmen was limited to the solicitation of sales and promotion of good will, and for all practical purposes they were devoid of any managerial responsibility. There is [fol. 247] testimony that one salesman had at times held himself out as defendant's district manager. The record indicates doubt whether this was with or without taxpayer's knowledge.

Based upon taxpayer's activities as disclosed by the record connected with its operations in Minnesota, the trial court found that those activities consisted of a regular and systematic course of solicitation of orders for the sale of merchandise, such orders being subject to approval, acceptance, filling, and delivery by the taxpayer from its home office at Mason City, Iowa. The court found that a

predecessor of defendant had resorted to the courts of Minnesota to enforce its contract on one occasion. The record does not disclose that the present defendant has at any time resorted to the courts of this state to enforce its contracts. The trial court in its memorandum, which was made a part of the decision in this case, stated *"Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both."* (Italics supplied.) The court below also characterized taxpayer's activities in this state as an integral part of its interstate activities, with all revenues received by it from customers' sales in Minnesota resulting from its operation in interstate commerce.

The trial court, nevertheless, by its conclusions of law, determined in effect that taxpayer's activities in Minnesota were sufficient in the local field to render it subject to the court's jurisdiction and moreover subject to taxation based upon apportionment under the formula applied to determine taxpayer's net income from its Minnesota activities. Based upon the findings made, it concluded that the tax as assessed, and if collected, does not contravene the due process clause of either U. S. Const. Amend. XIV, or Minn. Const. art. 1, §7, nor does the tax as assessed conflict with or violate the commerce clause, U. S. Const. art. I, §8, [fol. 248] clause 3."

Even though the position of the taxpayer herein that mere solicitation does not constitute sufficient doing of business to subject defendant corporation to suit is some-

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[27] U.S. Const. art. I, §8, clause 3, provides:

"The Congress shall have power:

* * * * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

U.S. Const. Amend. XIV, §1, provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, * * * ."

Minn. Const. art. 1, §7, provides in part:

"No person shall * * * be deprived of life, liberty or property without due process of law."

what persuasive, we take no issue with the majority opinion on its statement relative to service of process or the question whether the courts of Minnesota acquire jurisdiction of taxpayer.

Difficulties are encountered because of the natural inclination to equate amenability to service of process to jurisdiction to tax. Such, however, is not the case. Amenability to suit and imposition of the taxing power are distinct problems. While the service of process may well subject the taxpayer corporation here involved to jurisdiction in personam, there remains nevertheless the question of jurisdiction of the thing as distinguished from the jurisdiction of the person, even though in International Shoe Co. v. Washington, 326 U. S. 310, 321, 66 S. Ct. 154, 161, 90 L. ed. 95, 105, the United States Supreme Court stated:

> "• • • The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax."

We consider the important questions on this appeal to be (1) whether M. S. A. 290.03 is in conflict with and violative of the due process clauses of U. S. Const. Amend. XIV, and Minn. Const. art. 1, §7, insofar as it seeks to impose a tax [fol. 249] on income of a foreign corporation which arises wholly out of sales and activities carried on and consummated exclusively in interstate commerce and, except for continuous and systematic solicitation on the part of its salesmen and their activities within the state, otherwise conducted exclusively without and beyond the borders of the state of Minnesota, and (2) whether §290.03 is in conflict with and violative of the commerce clause, U. S. Const. art. I, §8, clause 3, insofar as it seeks to impose a tax on the net income of taxpayer, a foreign corporation, whose business activities in this state were an integral part of its interstate activities and whose business consists exclusively of interstate commerce.

Deciding that the taxpayer, a foreign corporation, can be sued in Minnesota, does not decide that it is subject to being taxed in this state. The question of the application of the taxing power must be decided upon the merits.

See, Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291; 18 Fletcher, Cyclopedia of Corporations (Perm. ed.) §8712. The operating incidence within the taxing state of the foreign corporation is controlling as to liability to taxation or other burdens which may be imposed upon interstate commerce measured by the multiple-burden test.

The claimed activities of the taxpayer's soliciting salesmen allegedly give rise to the tax issue here. Jurisdiction in personam, not offensive to traditional notions of fair play, allows the trial court to proceed to decide the issues arising in the case on its merits.

Section 290.03, upon which the state relies for the collection of the taxes assessed against the taxpayer,[28] in fact provides for an annual tax without designating the type of tax. The tax is measured by the net income according to the apportionment formula provided for in §290.19. See, [fol. 250] Western Auto Supply Co. v. Commr. of Taxation, 245 Minn. 346, 71 N. W. (2d) 797. Although the tax is measured by net income, and the commissioner of taxation and the taxpayer corporation do not contend that it is anything but an income tax, it has elements of an excise tax.

An excise tax is synonymous with a privilege tax. American Airways v. Wallace (M. D. Tenn.), 57 F. (2d) 877. The mere fact that the tax is measured by a percentage of net income does not prevent it from being an excise or privilege tax. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. ed. 165.

An excise tax is an indirect charge for the privilege of following an occupation or trade, or carrying on a business; while an income tax is a direct tax imposed upon income and is as directly imposed as is a tax on land. United States v. Philadelphia, B. & W. R. Co. (E. D. Pa.), 262 F. 188. The constitutionality of the tax depends upon the substance of the statute and the real character of the tax, rather than upon the name given the tax by the legislature.

A tax measured by the income or earnings of a corporation may be in fact an excise or franchise tax, although the statute imposing the same does not so denominate it.

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[28] See footnote 26.

Security Sav. & Commercial Bank v. District of Columbia, 51 App. D. C. 316, 279 F. 185.

However, determining that a tax is an excise tax on the privilege of doing business is not to decide the case. Practical operation, not descriptive labels, of the challenged tax statute must and will determine validity of application. Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. ed. 1613. Mr. Justice Reed in a footnote in his dissent in that case noted (337 U. S. 677, 69 S. Ct. 1272, 93 L. ed. 1626):

> "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business, we have treated them as identical as far as their validity under [fol. 251] the commerce clause is concerned."[29]

In one of the opinions appearing in connection with the litigation of Spector Motor Service v. O'Connor (2 Cir.), 181 F. (2d) 150, 156, the court reviewed its function concerning state taxation of interstate commerce as follows:

> "We should not be understood as claiming that the constitutionality of a tax should depend upon the name the legislature has given it. * * * Hence we do not suggest that the tax is automatically constitutional merely because it is measured by net income, and a net income tax has been held to be an indirect burden. *Rather we should look to the actual operation of the tax and decide whether it discriminates against interstate commerce, whether it is unduly burdensome to interstate commerce, whether it attempts to reach activities outside the borders of the state, and whether it is susceptible of being repeated by any other state. If these questions are answered in the negative, if the tax is a fair and a just attempt to make all commerce,*

[29] As previously stated: "This court has repeatedly adjudged that * * * the judiciary will not regard mere forms, but will look through forms to the substance of things." Western Union Tel. Co. v. Kansas, 216 U.S. 1, 27, 30 S. Ct. 190, 197, 54 L. ed. 355, 366.

intrastate and interstate, bear its share of the costs of government, then the tax should be held valid." (Italics supplied.)

See, also, Spector Motor Service v. Walsh (2 Cir.), 139 F. (2d) 809, including dissent by Judge Learned Hand.

A state's area of taxation is limited by its geographical borders. Generally, where interstate commerce is involved, the general business situs of taxpayer being wholly in another state, property or the existence of business activities sufficient in the local field to be designated or classified as intrastate commerce must be found within the taxing state, affording an appropriate channel through which to tax, before that state may levy a tax which even indirectly affects the business of a foreign corporation. Where taxpayer is engaged both in interstate and in intrastate com- [fol. 252] merce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, in order to arrive at the measure of business within the taxing state, may compute the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state and, as a basis for arriving at its apportionment, include in its calculations both interstate as well as intrastate business. It may be said that it is in substance the rule that the interstate commerce clause prohibits the state which is not the domiciliary one from taxing in any manner the act of engaging in interstate commerce within its limits and also from taxing property engaged in interstate commerce, when it may legally do so, at a higher rate than any other property. It would appear to be generally understood that every form of taxation directly imposed upon interstate or foreign commerce is prohibited to the states beyond all controversy and that the only question which arises in this class of cases is how far a state tax may incidentally affect the free flow of foreign or interstate commerce without falling within the inhibition implied from the exclusive power of Congress, to which the Constitution commits the regulation of commerce with foreign nations and among the several states. It would be a simple matter if the exact limits of the power of a state to levy taxes which incidentally affect interstate commerce were

capable of precise definition. Decisions must be made depending upon the facts in each case since almost every tax imposed by a state in some degree affects interstate commerce. Always, the important question is whether interstate commerce is affected to an unconstitutional extent and whether the degree to which it is affected constitutes an undue burden upon such commerce.

In Alpha Portland Cement Co. v. Commonwealth, 248 Mass. 156, 142 N. E. 762, it was held by the state court that a state may lawfully impose an excise tax on a foreign corporation engaged exclusively in interstate commerce provided the tax is measured by net income from the business transacted in the taxing state. It would appear that the Massachusetts court in the foregoing case and in [fol. 253] Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 139 N. E. 158, based its decision upon the theory of remuneration for local protection and benefits without reference to the distinction drawn in some cases between local taxation of foreign corporations engaged exclusively in interstate commerce and those engaged in both interstate and intrastate commerce.

The United States Supreme Court, however, in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916, reversed the decisions of the Massachusetts court in both cases, holding that the imposition of the tax was an unconstitutional burden on interstate commerce. The United States Supreme Court in that decision in effect denied altogether the power of the state to impose a tax in any form on a corporation engaged exclusively in an interstate business. As that court is the final arbiter of questions of the character involved, it must appear somewhat obvious that, until that decision is overruled or limited by the United States Supreme Court iself, (sic) it has thereby settled the question, not only of the power of a state to impose an excise tax, or even a net-income tax if the tax be denominated as such, on foreign corporations engaged exclusively in interstate commerce measured by income from business within the state, but of the power to impose a tax in any form on such corporations.[30]

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[30] See, Annotation, 44 A. L. R. 1228 to 1231.

It was laid down as a general rule in Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365, that a state taxing statute which discriminates against interstate commerce is invalid. We think it well settled under the constitutional provisions involved here that interstate or foreign commerce may not be taxed by a state and that a state may not impose upon foreign corporations a tax for the privilege of engaging in such commerce except where the local incidence of the operations in the taxing state lays a [fol. 254] basis for classifying such local operations as intrastate activity,[31] or in essence as intrastate commerce.

Upon a state of facts similar to those of the instant case, the United States Supreme Court in Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 153, 38 S. Ct. 295, 296, 62 L. ed. 632, 636, said:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.*" (Italics supplied.)

The Supreme Court of the United States in holding that the attempted imposition of the income tax was void and repugnant to the commerce clause of the United States Constitution in the Alpha Portland Cement Co. case, relying on its earlier decision in the Cheney Brothers Co. case, said (268 U. S. 219, 45 S. Ct. 481, 69 L. ed. 924):

> "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Brothers Co. v. Massachusetts, and

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[31] Also, see, Annotations, 105 A. L. R. 11 to 67, and 117 A. L. R. 444 to 446.

> cannot be enforced against a foreign corporation which does nothing but interstate business within the State. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

Thus, the United States Supreme Court struck down the attempted imposition of an *income tax* as unconstitutional when applied to a foreign corporation doing only interstate business in the taxing state, where no local incidence follows from the operational activities of a foreign corporation giving rise to intrastate business or commerce, holding, in that situation, that a state may not tax the interstate [fol. 255] business of a corporation of another state.[32] The principles of the latter cases were followed in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573.

The issue before the United States Supreme Court in that case had been rather distinctly stated by Judge Learned Hand in his dissenting opinion in Spector Motor Service v. Walsh (2 Cir.) 139 F. (2d) 809, 822, where he said:

> "* * * we have before us in the barest possible form the effort of a state to levy an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid."

In Norton Co. v. Dept. of Revenue, 340 U. S. 534, 537, 71 S. Ct. 377, 380, 95 L. ed. 517, 520, the United States Supreme Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that *the State of the buyer has no local grip on the seller.*" (Italics supplied.)

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[32] Western Union Tel. Co. v. Kansas, 216 U.S. 1, 30 S. Ct. 190, 54 L. ed. 355.

In Memphis Steam Laundry Cleaner v. Stone, 342 U. S. 389, 72 S. Ct. 424, 96 L. ed. 436, Mr. Chief Justice Vinson speaking for the court made it clear *that a tax, the operational incidence of which caused it to fall upon solicitation of interstate business, was a tax on interstate commerce itself.* The court then stated why the tax would not be permitted to conflict with the constitutional mandate on the regulation of commerce between the states (342 U. S. 395, 72 S. Ct. 428, 96 L. ed. 441):

> "* * * The Commerce clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

[fol. 256] Other cases that bear with considerable force upon the interstate commerce questions involved here are Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S. Ct. 184, 69 L. ed. 439; Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. ed. 1613; Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993; McLeod v. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023, 88 L. ed. 1304; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, 98 L. ed. 583; Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265; Adams Mfg. Co. v. Storen, *supra;* Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. ed. 272; Nippert v. Richmond, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760.[33]

The commerce clause of the Federal Constitution controls the respective powers of the state and Federal governments

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[33] Since the decision in the Spector Motor Service case, several of the highest state courts have ruled upon local taxes laid on exclusively interstate business declaring them void. Mississippi River Fuel Corp. v. Hoffman, 4 Ill. (2d) 468, 123 N.E. (2d) 503; Gross Income Tax Division v. Surface Combustion Corp., 232 Ind. 100, 111 N.E. (2d) 50; Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A. (2d) 700.

in connection with interstate commerce. The commerce clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but it is a commitment to it by the Constitution to regulate commerce with foreign nations and among the several states. It also creates an area of trade free from interference by the states, and none is permitted to take any action which may be deemed to impede the free flow of trade between states. We think the record clearly indicates that taxpayer is exclusively engaged in interstate commerce, subject only to a determination of the question whether the local incidence of its operations in Minnesota provide a basis for the assess-[fol. 257] ment of the tax which the state seeks to impose and that under the decisions we have just referred to, to the extent that the taxpayer's activities are exclusively in interstate commerce, there will be immunity from state taxation.

The governing principles, which were early stated in McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 4 L. ed. 579; Brown v. Maryland, 25 U. S. (12 Wheat.) 419, 6 L. ed. 678, and repeated in Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694, indicate that the taxing power of the states has for the most part been closely scrutinized in the commerce field, while Congress, which has the power to lessen or take away immunity in the interstate commerce field in state taxation, has been slow to interfere, except in a limited way and in limited and prescribed fields with the added burden light and controllable, where to do so would impede the free flow of trade between the states. A burden on interstate commerce is no less objectionable because it is imposed by a state under the taxing power rather than under the state police power. Freeman v. Hewit, *supra*. Interstate commerce should bear its fair share of the tax load. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823. However, to suggest that a tax on interstate commerce is valid because a similar tax is placed on local trade is to disregard the commerce clause. Freeman v. Hewit, *supra*. So long as the commerce clause is recognized as preventing any interference with inter-

state trade, there will be discussion concerning the conflicting claims of the state taxing power and the commerce clause. See, Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 Wash. U. L. Q. 233; Kraus, *The Implications of the Spector Motor Service Case;* 56 Dickinson L. Rev. 107; see, also, list of articles in Spector Motor Service v. O'Connor (2 Cir.), 181 F. (2d) 150, 154.[24]

[fol. 258] As has been so often stated, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. Western Live Stock v. Bureau of Revenue, *supra;* McGoldrick v. Berwind-White Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 565. *Although interstate commerce must pay its way, a state cannot put a barrier around its borders to bar trade from other states and thus run contrary to the power in Congress to regulate commerce among the states.*

In Miller Brothers Co. v. Maryland, 347 U. S. 340, 74 S. Ct. 535, 98 L. ed. 744, there was no duty on an out-of-state merchant to collect and remit a tax on the use, storage, or consumption of articles, even though the vendor's advertising with papers and radio stations of its home state reached the people in the taxing state; its occasional sales circulars mailed to all former customers included customers in the taxing state; and some of the purchases were delivered in the taxing state by common carrier and some by the vendor's own trucks. There was not sufficient local incidence to sustain the taxing power.

In Norton Co. v. Dept. of Revenue, *supra*, the United States Supreme Court sustained a tax on gross receipts from all sales to persons in Illinois, except on orders sent directly by the customers to the head office and shipped

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[24] Mr. Justice Black, concurring in Northwest Airlines v. Minnesota, 322 U.S. 292, 302, 64 S. Ct. 950, 955, 88 L. ed. 1283, 1290, said:

"These problems, it seems to me, call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution."

directly to the customers from the head office. *The exception made is significant because of the similarity of facts in the case at hand where orders were sent to Mason City, Iowa, for acceptance and shipment of goods f. o. b. Mason City.* The local incidents were a branch office which made local sales at retail from a limited inventory carried there, received orders and forwarded them to the head office for action there, and acted as an intermediary to reduce freight charges on goods shipped from the head office. The case is distinguishable because of the existence of a substantial retail sales outlet, not found in the instant case.

In Nippert v. Richmond, *supra,* a license tax was invalidated. The tax had been imposed upon a solicitor who [fol. 259] had been in the city for five days soliciting orders for out-of-state confirmation and shipment into the state. Notwithstanding that only casual solicitation was involved, the case is persuasive for the proposition that mere solicitation is not sufficient to uphold the application of the tax. However, because the court questions the conclusiveness of the local-incidence test, use of the case may not be well taken. The court states that local incidence will be weighed along with the danger of multiple burden taxation. The court also states that it would be possible to find local incidence in any case (327 U. S. 423, 66 S. Ct. 589, 90 L. ed. 764):

> "* * * All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact."

Included in this statement is the recognition that interstate commerce must necessarily be carried on within the states (327 U. S. 423, 66 S. Ct. 589, 90 L. ed. 764):

> "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the

state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

Thus, the United States Supreme Court gives consideration to the operating incidence of the tax. No case has ever actually departed from the basic principle that interstate commerce cannot be taxed by the states in the absence of local or intrastate business.

In McLeod v. Dilworth Co. *supra*, the United States Supreme Court made it clear *that a tax cannot be collected by the buyer's state on orders solicited in one state, accepted in another, and shipped at the purchaser's risk. The mere solicitation of orders is not sufficient local incidence to support the tax*

[fol. 260] In Cheney Brothers Co. v. Massachusetts, *supra*, from which we have quoted, it is clearly established that a foreign corporation is not subject to taxation when it merely maintains salesmen in the taxing state who have no power to confirm orders or collect accounts, or adjust complaints. The taxpayer was a Connecticut corporation engaged in manufacturing and selling silk fabrics. It maintained a selling office in Boston with one office salesman and four other salesmen, who, like those employed by the defendant company in Minnesota, solicited and took orders subject to approval by the home office in Connecticut, and the corporation shipped goods directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. The Boston office retained copies and records of orders taken but did no bookkeeping and made no collections. The salesmen and the office rent were paid directly from the home office, and other expenses of the Boston office were paid from a small account kept in Boston for that purpose. The corporation did no other business in the state.

In Alpha Portland Cement Co. v. Massachusetts, *supra*, heretofore alluded to, which follows the Cheney case, we have a New Jersey cement company maintaining an office in Boston, Massachusetts, *in the charge of a district sales manager* where the corporation's correspondence and other

activities in connection with the solicitation of orders could be carried on. Orders received at the Boston office were transmitted to the principal office of the corporation in Pennsylvania for acceptance. All goods and invoices were sent directly to the customer. Payments were usually made to the Pennsylvania office, but, unlike the instant case, occasionally salesmen accepted payments. No samples or other merchandise were kept in Massachusetts. Its only property in that state was its office furniture and fixtures. Salaries and office rent were paid from the home office. Unlike the instant case, an incidental-expense bank account was maintained. The activities of the Alpha Portland Cement Co. in Massachusetts were more extensive than those of the defendant company in Minnesota; yet the United States Supreme Court struck down the tax as invalid.

[fol. 261] Memphis Steam Laundry Cleaner v. Stone, *supra*, stated the function of the courts (342 U. S. 392, 72 S. Ct. 426, 96 L. ed. 439):

> *"The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.'"* (Italics supplied.)

Whether or not solicitation of interstate business may have some semblance of being a local incident, the United States Supreme Court has not permitted state taxation of this integral part of interstate commerce. Memphis Steam Laundry Cleaner v. Stone, *supra*, and cases cited therein.

The state places a great deal of reliance on International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. ed. 95, in support of its position. That case is chiefly important for its holding rendering the interstate corporation amenable to suit in the state courts on the basis of a finding of certain local incidents in addition to solicitation. The imposition of the state unemployment compensation tax cannot be questioned. The commerce clause authorizes Congress to regulate interstate commerce. Congress by statute, now coded as 26 USCA §3305(a), has authorized the levying of the state unemployment compen-

sation tax. Thus, since Congress has the power to authorize such a tax, there is no basis for attacking the tax on commerce-clause grounds. The International Shoe Co. case is distinguishable because there is no similar Congressional authorization for the levying of the Minnesota tax.

The state in its argument makes a point of admitting that a tax on the privilege of engaging in interstate commerce would be unconstitutional. However, the state goes on to argue that application of an income tax under the three-factor formula may be legally and constitutionally applied, even though there is no intrastate commerce or local incidents amounting thereto. Clearly this is contrary to the admitted rule that a state cannot tax the privilege of engaging in interstate commerce. The tax here involved imposes a direct tax upon interstate commerce. *If the tax-*
[fol. 262] *payer is engaged exclusively in interstate commerce, then its imposition is violative of the commerce clause and unconstitutional. It must find intrastate commerce activity to support its imposition or it is void as a direct tax. The state definitely argues the competitive privileges and advantages taxpayer has enjoyed over the years selling its cement products to Minnesota dealers. Unless taxpayer is actually engaged in intrastate commerce as such in some form, and not engaged exclusively in interstate commerce, the state's contention without that local incidence as a base amounts to arguing for the imposition of the tax based upon the privilege, which taxpayer constitutionally enjoys free from state-tax intervention, of transacting its interstate business in the field of commerce between the states.*

The present views of the United States Supreme Court are clearly set out in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573. The court stated that interstate commerce cannot be taxed by the states in the absence of local or intrastate business. The dictum suggesting otherwise, in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 62 S. Ct. 857, 86 L. ed. 1090, was repudiated. The court stated (340 U. S. 608, 71 S. Ct. 512, 95 L. ed. 578):

"• • • The incidence of the tax provides the answer. The courts of Connecticut have held that the tax be

fore us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory.

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. *The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to* [fol. 263] *business done within the state.* Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 (measured by percentage of capital stock and surplus). See Interstate Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq. (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Co., 330 U.S. 422; Freeman v. Hewit, *supra.*" (Italics supplied.)

Although the case has been criticized as applying mechanical standards in determining what is the dividing point between interstate and intrastate commerce, there is no alternative so long as there can be no tax on the privilege of doing interstate commerce. The determination of what is interstate commerce must necessarily involve the analysis and distinguishing of facts. Freeman v. Hewit, *supra.*

The dissent in the Spector case not inappropriately states that there is (340 U. S. 612, 71 S. Ct. 513, 95 L. ed. 580) "apparent need for clearing up the tangled underbrush of past cases." To reconcile all of the cases involving state taxation of interstate commerce would be a nearly impossible task. As stated before, there is comfort in recognizing that the courts consider each case on the basis of its own facts. See, Annotation, 44 A. L. R. 1228.

The state relies on a number of cases that unquestionably stand for the proposition that there can be no tax on the privilege of doing interstate business. United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135, held that a net-income tax was an indirect burden, thus not unconstitutionally imposed, noting that a gross-receipts tax is a direct burden. The case is distinguishable because the taxing state was the domicile of the interstate corporation. It maintained executive offices and an extensive manufacturing plant in the state of its domicile, the taxing state. No one would question the power of the state of Iowa to impose a net-income tax on taxpayer, domiciled there, yet engaged in interstate commerce, which would be the analogous situation.

[fol. 264] The power of Iowa to impose a tax on taxpayer's net income, although not to be decided here, suggests the danger of multiple taxation which is grounds for invalidation of the Minnesota tax. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823. Taxpayer has its executive offices and manufacturing plant in Iowa. *Under the multiple-burdens test, such state taxes on interstate business are invalid as are susceptible of being imposed with equal right by other states, so that interstate commerce is required to bear a heavier burden of taxation than is intrastate commerce.*

In both Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832, and Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. ed. 1613, a divided court upheld the imposition of a tax. The United States Supreme Court relied to some extent on the interpretation and application of the state statutory provision of "doing business" by the Mississippi Supreme Court. There was acceptance of the interpretation that the incidence of the tax was on local activities. The cases are distinguishable on the basis of finding local incidents of operation. Apparently, the United States Supreme Court has considered the pipe line cases to be best understood when taken together, even though the test is the same. In Memphis Natural Gas Co. v. Stone the court said (335 U. S. 89, 68 S. Ct. 1479, 92 L. ed. 1840):

> "* * * This Court has drawn the distinction in the field of pipe line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents."

Local incidence of operation is controlling. Maintenance, repair, and manning of a pipeline was sufficient for the conclusion that the tax was on intrastate business.

Butler Brothers v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. ed. 991, involved an interstate corporation which maintained one of its wholesale distributing houses in the [fol. 265] taxing state. Each of its houses maintains stocks of goods, serves a separate territory, has its own sales force, handles its own sales and all solicitation, credit, and collection arrangements in connection therewith, and keeps its own books of account. Although the court did not apply the incidence of operation rule, it is clear that the court thought there was no question but that intrastate activity was involved. There was much more than mere solicitation in the Butler Brothers case, and thus the case is distinguishable.

West Publishing Co. v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861, can be distinguished from the instant case because more than solicitation was involved. The salesmen were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. Although these activities are closely allied with solicitation, they are nonetheless activities in addition to the activities of mere solicitation. The West Publishing Co. case may be further distinguished from the instant case because therein the taxing statute, unlike §290.03 as applied here under the apportionment formula, was limited in application to income from sources of books and periodicals delivered in the state seeking to impose the tax.

The Butler Brothers and West Publishing Co. cases, following doctrine set out in United States Glue Co. v. Town of Oak Creek, *supra*, apparently proceed on the theory that a net-income tax, even on an exclusively inter-

state business, is an indirect burden on commerce and thus valid. To so reason is to ignore the approach of determining whether there are local incidents to uphold a finding of intrastate business. To use the direct-indirect distinction is to a large extent to characterize a result. In discussing the various approaches used by the courts, one text writer [fol. 266] stated:

> "Prior to 1938, when the Court was declaring that interstate commerce was exempt from local taxation, a tax was saved by declaring that the effect of the tax on interstate commerce was 'indirect,' which is a fashion in judicial speech tantamount to the conclusion that the taxed event was not considered interstate commerce. A tax levied on the actual movement of interstate commerce, or on the privilege of engaging in, or on gross receipts from that commerce, or on the means and instrumentalities used in interstate commerce (property taxes permitted) was struck down as having a 'direct' effect or being a 'direct' burden upon the commerce, which was another way of saying that there is no local power to tax interstate commerce." Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 Wash. U. L. Q. 233, 241.

The local-incidents test, with a line drawn at solicitation in cases involving distribution of merchandise and goods, places emphasis on an analysis of the facts. The defendant company was careful in its operations in Minnesota. None of its activities, if we follow the Cheney, Alpha, Spector, and Memphis Steam Laundry Cleaner cases, as well as other numerous pronouncements by the United States Supreme Court, can be construed to extend beyond solicitation, nor the business thus conducted be other than exclusively interstate commerce. Nothing appears from the contentions and the arguments presented, oral or written, exhibiting extensive research by both sides, which renders the line of decisions beginning with the Cheney case inapplicable here. The doctrine therein announced has been adhered to and reaffirmed by the highest court since the advent of the Cheney case.

Notwithstanding that solicitation is an integral part of interstate business, there is alternative reasoning which could be applied to the cases already discussed. It is submitted that commerce clause grounds are better taken; however, due process under Amend. XIV requires some connection between the taxing authority and the taxpayer. A recent pronouncement by the United States Supreme Court in Miller Brothers Co. v. Maryland, 347 U. S. 340, 344, 74 S. Ct. 535, 538, 98 L. ed. 744, 748, states:

> "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this col- [fol. 267] lector's liability. * * * Our decisions are not always clear as to the grounds on which a tax is supported, * * * ; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. * * * *But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*
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> "* * * Certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property." (Italics supplied.)

The overriding principle evident in this case and others involving state taxing powers is that operating incidence of the tax is of primary consideration. Depending on the facts of each case, state taxing powers may or may not be exercised. As suggested, sales or use may be sufficient basis for the tax. The state of domicile, or the state in which a corporation has permission to do business, may when the required circumstances exist impose taxes. Even

the least of these, *permission to do business*, may be the subject of this tax. *Mere solicitation, however continuous, has not been held sufficient to uphold a tax such as the one sought to be imposed here in any of the cases presented or any cases discovered through independent research.*

Similar taxes have been invalidated at levels below the United States Supreme Court. In State v. American Can Co., 117 Colo. 312, 186 P. (2d) 779, a tax on the entire net income derived from business transacted within that state was invalidly applied to a corporation of another state engaged in interstate business. The facts, similar to the facts in the instant case, included solicitation by men whose orders must be accepted at one of its foreign offices for goods manufactured outside the state and delivered to points outside of the state for shipment to state customers in the taxing state. In contrast the Colorado court, a short [fol. 268] time before the decision in the American Can Co. case, had decided Cruse v. Stayput Clamp & Coupling Co., 113 Colo. 254, 156 P. (2d) 397. The latter case involved a net-income tax on a corporation domiciled in Colorado, the taxing state. The corporation maintained its executive offices and manufacturing plant in Colorado. The court upheld the imposition of the tax. It is clear from these two cases that the domiciliary state may impose its net-income tax following the line of cases coming down from United States Glue Co. v. Town of Oak Creek, *supra*. However, the state attempting to apply its net-income tax to the interstate business of a corporation not domiciled in the taxing state must find local incidents of intrastate-commerce quality sufficient to uphold the tax.

In Matter of United Air Lines v. Joseph, 282 App. Div. 48, 121 N. Y. S. (2d) 692, there is similar invalidation of a gross-receipts tax, the question being whether there were sufficient local incidents to uphold the tax. The court in that opinion stated (282 App. Div. 54, 121 N. Y. S. [2d] 698): "The Western Live Stock case is misunderstood if one fails to note in reading the last two paragraphs quoted that in order to apportion a privilege tax on interstate commerce there must first be some local or intrastate commerce. Mr. Justice Stone so states, the authorities cited by him and omitted from the quotation, so held expressly,

or involved such factual support for their holding." It may be remembered that the Western Live Stock case is frequently cited as authority for a nondiscriminatory tax on interstate commerce. Nevertheless, as recognized by the New York court, there must be connection with the taxing state so as to support a finding of intrastate commerce. A case decided at the same time as the United Air Lines case, and relying thereon for similar finding of an invalid application of the tax, is Matter of United Piece Dye Works v. Joseph, 282 App. Div. 60, 121 N. Y. S. (2d) 683, wherein the court held that the mere selling of merchandise or [fol. 269] services in a state other than one in which seller was located did not subject seller to tax jurisdiction in such other state.

For further support, see Farwell, Ozmun, Kirk & Co. v. Wallace, 45 N. D. 173, 177 N. W. 103, where a tax was held to be invalidly levied directly on the proceeds in the taxing state arising out of interstate commerce of a corporation not engaged in doing intrastate business.

A most recent pronouncement made by a state court, based upon a state of facts similar in many respects to that which presently confronts us, is to be found in Commonwealth v. Eastman Kodak Co., 385 Pa. 607, 124 A. (2d) 100. In that case the judgment of the lower court that a foreign manufacturer of photographic equipment, which had no tangible property in Pennsylvania except salesmen's automobiles and no office or place of business in Pennsylvania and was not registered to do business in the state and made no contracts therein, was not subject to the corporation income tax was affirmed by the Pennsylvania Supreme Court. The court held that the imposition of the tax on the corporation constituted a violation of the interstate commerce clause because it attempted to tax local business activities which were an integral part of the interstate flow of commerce that could not be separated from it. The persuasiveness of the Pennsylvania decision cannot be ignored. The Pennsylvania act under consideration openly states in the face of the commerce clause "A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions or other compensa-

tion, or the gross receipts of the corporation, are found to be situated, incurred or received without the Common- [fol. 270] wealth." 72 Purdon's Penn. Stat. Ann. (Perm. ed.) §3420n-2. The Pennsylvania court characterizes this statement of its statute as indicating the true nature of the tax. The Minnesota act in the instant case does not expressly state that it attempts to tax on the basis of outstate factors, thus the cases might be distinguished on the basis of the acts; however, as recognized by the recent Pennsylvania decision, relying upon cases cited from the Pennsylvania Supreme Court and the United States Supreme Court, the substance and not the form will control, i. e., the nature of a tax depends upon its incidence, not upon its label. The Pennsylvania court reached the conclusion that in the absence of incidence on local operation which was not an integral part of interstate commerce the tax was invalidly imposed and that their Corporation Income Tax Law of 1951 in its application to the defendant therein was a violation of the interstate commerce clause and therefore unconstitutional.

The only marked dissimilarity in the facts in the latter case and the case at bar is that in the Pennsylvania case the defendant maintained no local office in the state from which its three resident salesmen operated, one of whom performed all of his services in Pennsylvania, and the fact that the Eastman Kodak Co. employed, besides its resident salesmen, 11 technical representatives who resided in Pennsylvania and who demonstrated to dealers and other users of photographic products the proper method to be employed in using defendant's products, four of whom confined their services within the state, the others performing services within the state and other states. Its tangible property in the state consisted of 10 automobiles, valued at $13,569. The comparison as to tangibles may be made by referring to the statement of facts in the instant case where taxpayer owned five automobiles and a small amount of office furniture in a three-room office, requisitioned, arranged for, and financed through the home office. In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 [fol. 271] S. Ct. 477, 69 L. ed 916, petitioner corporation maintained an office in the taxing state in charge of a dis-

trict sales manager. In the Pennsylvania case the taxing authorities sought to levy what purported to be a net-income tax based upon the operation of a three-fold formula not unlike what was done in the case at bar. The Pennsylvania court in discussing the manner of application of the three-fold formula to the facts of the case said (385 Pa. 615, 124 A. [2d] 103):

> "Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, *at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania.* Cf. Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A. (2d) 700, supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, namely, ten automobiles or on the income from local activities as such—*it is an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce.*" (Italics supplied.)

We cite for purposes of illustration and comparison Matter of Gulf Oil Corp. v. Joseph, 307 N. Y. 342, 121 N. E. (2d) 360. An examination of this case indicates that the primary problem was the application of the apportionment formula. The court in that case accepted without question the finding that the taxpayer carried on substantial local intracity and intrastate sales activities as well as interstate business.

Since we have a tax on sales, made from a foreign corporation's (taxpayer's) business establishment and manufacturing plant outside of the state and shipped on order solicited in the state to state customers by rail (common carrier), f. o. b. Mason City, Iowa, pursuant to prices quoted to customer at mill site rate, plus freight, and since the taxpayer's activities in the state form an integral part of its interstate activities, with all revenues received by it from customer sales in the state resulting from its opera-

tions in interstate commerce, the tax assessed in the instant case is a tax upon the net income of a corporation [fol. 272] whose business is exclusively that of foreign commerce or interstate commerce, or both, and therefore in contravention of the commerce clause, U. S. Const. art. I, §8, clause 3.

The state taxing statute, M. S. A. 290.03, for the reasons stated, is in its application to taxpayer, here, upon the facts submitted, a violation of the interstate commerce clause and therefore unconstitutional.

Stress has been laid, in the majority opinion, on McGoldrick v. Berwind-White Co. *supra*, as authority for the claim that upon the factual situation presented in the instant case a tax may be levied on taxpayer's net income wholly derived from interstate commerce. In that regard reference is made especially to the statements of the court in the McGoldrick case that (309 U. S. 47, 60 S. Ct. 392, 84 L. ed. 570) "A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited." These statements derive from the definite factual situation existing in that case and from the cases cited by the court in support of the conclusions reached regarding the application of the tax situation there presented. The taxpayer sold coal to New York public utility and steamship companies, being a Pennsylvania corporation engaged in mining coal in the latter state. The tax involved was a 2 percent tax upon receipts from every sale of tangible personal property sold within the city of New York. It was a tax laid upon every purchaser within the state, of goods sold for consumption, regardless of whether they had been transported in interstate commerce. Mr. Justice Stone, speaking for the majority of the court in that case, however, recognized the limitations imposed by the commerce clause and made it clear that certain types of taxation, by the states, are ruled out through the immunity afforded by the commerce clause. That statement is as follows (309 U. S. 48, 60 S. Ct. 393, 84 L. ed. 571):

"Certain types of tax may, if permitted at all, so [fol. 273] readily be made the instrument of impeding

> or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

It was held that the 2 percent tax laid upon every purchaser within the state, as applied to the Berwind-White Company, was without the possibility of such consequences. In that case taxpayer had asked the state courts to rule that the tax act did not apply to coal transactions which was the selling of coal to New York consumers for plants and steamships, particularly because the enabling statute expressly prohibits the city from imposing a tax upon (309 U. S. 58, 60 S. Ct. 399, 84 L. ed. 578) "any transaction originating and/or consummated outside the territorial limits of the City." This question had been left unanswered by the state court which had wholly rested its decision on constitutional grounds. Upon a reversal and remand of the case, the United States Supreme Court in its opinion said (309 U. S. 59, 60 S. Ct. 399, 84 L. ed. 578):

> "Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

In Freeman v. Hewit reference was made to the Berwind-White case as follows (329 U. S. 257, 67 S. Ct. 279, 91 L. ed. 274):

"It has been urged that the force of the decision in [fol. 274] the Adams case has been sapped by McGoldrick v. Berwind-White Co. * * *. The decision in McGoldrick v. Berwind-White was found not to impinge upon 'the rationale of the Adams Manufacturing Co. case,' and the tax was sustained because it was 'conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption.'"

Mr. Chief Justice Hughes, dissenting in the McGoldrick case, again made clear the principle which has been maintained throughout the years that the states cannot lay a direct tax upon interstate commerce. I am unable to agree that the McGoldrick case is controlling on the issues before the court in the case at bar. The case before us is one of interstate commerce in its most obvious form. We have here the imposition of a burden which intrastate commerce does not bear, and merely because interstate commerce is being done, places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The tax will not be saved if it directly burdens interstate commerce. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365.

Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 55 S. Ct. 477, 79 L. ed. 934.

It has been said heretofore that a desirable, just, and general scheme for raising revenues might well be reached through the cooperation of the Federal government and the states so as to avoid the differentiations which beset the application of the commerce clause and at the same time protect both state and national governments in the difficult field of general taxation. The consideration of such a policy belongs in the legislative field and is for the [fol. 275] Congress and not for the courts. So far Con-

gress has not seen fit to lift or set aside the duty of maintaining the immunity of the interstate commerce clause as the Constitution prescribes. We cannot lightly brush aside the statement made by Mr. Chief Justice Hughes in his dissent in the McGoldrick case (309 U. S. 69, 60 S. Ct. 404, 84 L. ed. 583):

> "* * * That immunity still remains an essential buttress of the Union; and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern of the national economy."

If the immunity afforded by the interstate-commerce clause applies in the instant case as contemplated by the Federal Constitution, then the within tax has been imposed, no matter by what name it is designated, without authority on the part of the state to do so.

I think the judgment entered against defendant taxpayer in the court below should be reversed.

Martin A. Nelson

[fol. 276] Frank T. Gallagher, Justice (dissenting).

In the instant case the trial court found that the defendant corporation's "activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

In its memorandum made a part of the decision the court said: "Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both." There was evidence to sustain such a finding and statement.

The majority appear to take the position, however, that the business which defendant did in Minnesota is large enough that it has become in effect a local business. It seems to me that the fact that the shipments into this state are extensive cannot change the nature of the business from that of interstate commerce, as found by the trial court, to intrastate commerce and thus form the basis of a finding of local activities upon which to sustain this tax.

In determining the constitutionality of a state tax on a foreign corporation's net income, it is necessary to distinguish those situations where the coporation (sic) is carrying on both intrastate or local business and interstate commerce in the taxing state from those situations where the corporation does only interstate business and all of its activities in the taxing state are therefore an integral part of interstate commerce.

From the holding in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573, a state tax, if reasonably measured, would be valid where the foreign corporation is engaged in both interstate and intrastate commerce in the taxing state but would be void as violating the commerce clause where such a corporation does purely an interstate business and all of its activities in the taxing state are an integral part of interstate commerce. Here we have a situation where it is undisputed from the court's findings that the activities of the defendant corporation in Minnesota are an integral part of its interstate activities; where all its revenue from Minnesota customers [fol. 277] resulted from its operations in interstate commerce; and where, according to the court's memorandum, the tax is on the net income from business exclusively that of interstate commerce.

In Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. ed. 632, and Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916, decided prior to the Spector case, the United States Supreme Court held invalid a Massachusetts tax on the net income of foreign corporations which were engaged only in interstate commerce in that state. As I see it, the Spector case reaffirmed the principle laid down in the Alpha and Cheney cases that a state cannot tax the net income produced by a corporation engaged solely in interstate commerce.

In view of the trial court's findings in the instant case and the holdings in the Spector, Alpha, and Cheney cases, I cannot agree with the majority that the attempted imposition of the tax here can be sustained. It seems to me that both the facts and taxing statutes involved in the Alpha case bear a close resemblance to the one before us.

In that case the State of Massachusetts attempted to impose a 2½ percent tax on that part of the company's net income derived from the business carried on in that state, not less than a tax of .05 percent on the corporation's net worth allocable to Massachusetts. In holding the tax invalid under the commerce clause, the United States Supreme Court said (268 U. S. 217, 45 S. Ct. 480, 69 L. ed. 923): "Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount."

It appears to me that McGoldrick v. Berwind-White Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 565, is distinguishable from the case at bar. That was a proceeding to review a determination of the comptroller of New York City assessing a New York City retail sales tax deficiency against a Pennsylvania corporation. The question for considera- [fol. 278] tion there was whether the New York City tax laid upon sales of goods for consumption as applied to the company infringed the commerce clause of the Federal constitution. As I see it, that case involved only a tax on sales of goods for consumption imposed by New York City where the merchandise was to be used and is not the same situation as here.

West Publishing Co. v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861, also is distinguishable. While the facts in that case are not set forth in the per curiam opinion of the United States Supreme Court, the California Supreme Court based its decision upon the finding that there were local activities. In that case the West Publishing Company maitained (sic) a stock of merchandise within the State of California. Its salesmen had authority to make and did make adjustments and collect delinquent accounts. With reference to its local activities the California Supreme Court had this to say (27 Cal. [2d] 707, 166 P. [2d] 862):

> "* * * During this time it had four regularly employed solicitors in this state who devoted their entire time to plaintiff's business. Its California employees were authorized to receive payments on orders taken

by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. The employees were given space in the offices of attorneys in return for the use of plaintiff's books stored in such offices."

No such local incidents are present here as the defendant company kept no stock of merchandise in Minnesota. All orders were sent directly to the foreign office and all orders were approved and collections and adjustments made out of that office. Rather it appears to me that defendant here has operated along the methods found in the Alpha and Cheney cases where the attempted tax was invalidated because of lack of local activities.

In conclusion, it is my opinion, under the record here, that the activities of the defendant company in Minnesota [fol. 279] were an integral part of its interstate commerce; that its Minnesota revenues resulted from its operation in interstate commerce; and that the attempted tax is on the net income of a business exclusively engaged in interstate commerce and therefore cannot stand.

For the reasons set forth I respectfully concur in the dissent of Mr. Justice Nelson.

Frank T. Gallager

[fol. 280] STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA, Respondent,

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

PETITION FOR REARGUMENT—Filed July 25, 1957

Northwestern States Portland Cement Company hereby petitions for reargument of the constitutional issues here-

tofore presented to this Court by said petitioner and as further developed in this petition for reargument, on the grounds that:

1. The majority opinion incorrectly adopts a construction of Minnesota Statutes, Section 290.03 which is contrary to the express language of the statute, which construction was not heretofore argued by either party.

2. The majority opinion incorrectly decides important Federal constitutional questions of great public interest which deserve further consideration by the Court.

[fol. 281] In view of the comprehensive and excellent analysis of the cases set forth in the dissenting opinions of Justice Nelson and Justice Gallagher, no attempt will be made here to restate matters discussed in those dissents.

In its opinion, the majority upholds the validity of this tax as levied under Section 290.03, Minnesota Statutes. That section provides in part as follows:

> "An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> "(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both; * * *."

The regulations promulgated by the Commissioner of Taxation of the State of Minnesota are as follows:

> "All corporations, domestic or foreign, whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M.S.A. 290.03 (1). This provision requires the imposition of a tax on the net income from interstate commerce or foreign commerce assignable to Minnesota."

[fol. 282] A mere reading of the statute in connection with the Commerce Clause compels the conclusion that the statute is void on the face of it, for the decisions are clear that no state can tax income produced exclusively in interstate commerce unless there is something more than just that commerce in the taxing state. This Court, then, apparently in an effort to escape that dilemma, rationalizes that when interstate commerce becomes extensive, it, in effect, then becomes localized. This certainly is a new concept as to what constitutes "local activities". Assuming, arguendo, that interstate commerce when extensive becomes localized, then the tax here assessed should have been levied under Section 290.02, Minnesota Statutes, and not under Section 290.03.

Section 290.02 provides as follows:

> "An annual tax is hereby imposed upon every domestic corporation, except those included within Section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any *local business* within this state during any part of its taxable year, in corporate or organized form." (emphasis supplied)

It will be noted that under the above section, an annual tax is imposed upon "every • • • foreign corporation • • • [fol. 283] for the actual transaction by it of any *local business* within this state during any part of its taxable year • • • •". If the taxpayer here had been engaged in local activities, then clearly the tax would have been levied under Section 290.02. It was not until the opinion of this Court was rendered that there was any assertion by anyone, including the state taxing authorities, that there was any "*local business*" carried on by the Northwestern States Portland Cement Company. Unquestionably had the taxing authorities been of the view that there was local business or local activities, the assessment would have been made under Section 290.02, which specifically provides for a tax in those cases.

Therefore it would appear that this Court, in order to uphold the validity of the tax levied under Section 290.03, has interpolated into the statute words not supplied by the Legislature. As applied in this case, it would appear that Section 290.03 now has been construed to mean that an annual tax will be imposed upon the net income of foreign corporations whose business within this state "consists exclusively of interstate commerce" when "that commerce, although exclusively interstate, is so extensive it has become localized". No support can be found in the history of the Act for this interpretation. The Commissioner of Taxation's own regulations are to the contrary. Both the statute and the regulations provide that the tax shall be levied on income from commerce that admittedly is exclusively in- [fol. 284] terstate, completely devoid of the "local business" requirement of Section 290.02. On the face of it, such a levy is invalid. The statute is clear and unambiguous. It leaves no room for judicial interpretation.

The majority opinion suggests that the tax in question is not an excise or privilege tax imposed upon the privilege of doing interstate business but rather is purely a net income tax "wholly unrelated to the privilege of engaging in interstate commerce." That view ignores completely, however, the language of Section 290.03 which unequivocally provides that the tax is imposed upon corporations "whose business within this state during the taxable year *consists exclusively of foreign commerce*, interstate commerce, or both." (emphasis supplied)

At the same time as it insists that the tax in question is unrelated to the defendant's privilege of doing interstate business, the majority recognizes that the tax could not be imposed against defendant but for its activities within the state promoting its interstate business. Thus, notwithstanding the majority opinion's verbal disavowal of such an end, the defendant company none the less is subject to the tax in question solely because it exercised its privilege of doing interstate business in Minnesota, a privilege which this state does not grant and is powerless to regulate or restrain.

The majority opinion seeks to avoid the dilemma created by its reasoning by asserting that the defendant, although

engaged solely in carrying on interstate business, has sub-
[fol. 285] jected itself to taxation by carrying on income producing activities and transactions which have become "localized" and have become "separated from the flow of interstate commerce." There is, however, no suggestion by the majority how these activities became separated from the flow of interstate commerce or how they become "localized."

The majority opinion would impose a tax on defendant's activities merely because a substantial part of defendant's gross sales were made to Minnesota customers, notwithstanding the fact that the activities were solely and exclusively to promote interstate business. In effect then if a foreign corporation sends in but one or two salesmen and only 10% of its total sales are to Minnesota customers presumably there would be no tax, but if the foreign corporation sends in four or five salesmen, and as a result 48% of its total sales are to Minnesota customers, there is a tax even though the activities involve no intrastate business. It is difficult to perceive just why volume alone would change the character of business from interstate to intrastate. The Due Process Clause and the Commerce Clause of the Federal Constitution prohibit the state from taxing the interstate activities, and the vice in such a tax is not removed merely because such interstate activities are extensively carried on within the state.

This case differs materially from the *Northwestern Consolidated Milling Company* v. *Commonwealth of Massachusetts* (see *Cheney Bros. Co., et al.* v. *Commonwealth of* [fol. 286] *Massachusetts*, 246 U.S. 147, 38 S. Ct. 297), relied upon by the majority. There, the salesmen for the milling company took orders from retailers for a wholesaler doing only intrastate business within the State of Massachusetts. The wholesaler maintained the stock of merchandise within the state, as did the milling company from which deliveries were made within the state. There was not, as was true here, "any approval of the orders by the home office." (See opinion of the Supreme Judicial Court of Massachusetts, 218 Mass. 558, 106 N.E. 310-317). It is obvious that the facts in the *Northwestern Consolidated Milling Company* case, supra, were completely different than they are here.

No such local activities exist here as were found there. In fact the record here clearly indicates that the operations of Northwestern States Portland Cement Company in Minnesota patterned every detail of its operations after those found in the *Alpha* case and the *Cheney Brothers* case. In both of those cases the attempted imposition of a tax by Massachusetts was struck down because there were no local activities in that state.

West Publishing Co. v. *McColgan*, 328 U.S. 823, 66 S. Ct. 1378, is easily distinguishable. In that case the facts were that West Publishing Co. maintained a stock of merchandise within the State of California; its salesmen were authorized to and did make adjustments; they even collected delinquent accounts. Such activities, of course, con- [fol. 287] stitute intrastate business on which the state could and did validly levy a tax. No such local incidents, however, are present here.

Support for the views of the majority here is sought from statements in the opinion of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940). The majority opinion fails to recognize that the *Berwind-White* case was decided in 1940, long prior to the final decision in the *Spector Motor Service* case. In fact when the *Spector* case was before the Court of Appeals for the Second Circuit in 1944 (139 F. 2d 809), that Court also placed great reliance upon *Berwind-White* with, however, one significant difference. That significant difference was that Circuit Judge Clark recognized that the Supreme Court of the United States had not, as of that date (1944), permitted state taxation of net income produced solely from interstate commerce activities.

In the *Spector* case, Judge Clark, directly after citing *Berwind-White* made the following observation:

> "When, however, a corporation is engaged within a state solely in interstate commerce, it must be conceded frankly, and this is the basis of the thoughtful conclusion of the court below, that the Supreme Court to date has held it immune from net income taxation by that state."

Nevertheless this Court, in direct contravention of the views of the United States Supreme Court as expressed [fol. 288] by Judge Clark, (and thereafter reaffirmed by the Supreme Court again in its *Spector* decision) now enunciates the rule that a corporation whose net income is solely derived from interstate commerce is not immune from income taxation by the state. Judge Clark, in his opinion, although recognizing that both *Alpha* and *Cheney* barred any tax on "net income" produced exclusively from interstate commerce, was then of the view, however, that certain doctrinal trends appearing in intervening decisions had impaired the authority of both *Alpha* and *Cheney*. The danger involved in such thinking was pointed up by Judge L. Hand, in his dissenting opinion in the *Spector* case, wherein he stated in part:

> "• • • Up to the present, so far as I can see, the immunity of interstate commerce from such taxation as such has rested upon the same considerations which still prevail as to the immunity of an activity of the United States" (See page 823 of opinion).

Judge L. Hand clearly sets forth the rule that activities consisting only of interstate commerce are just as immune from state taxation as an activity of the United States itself.

Whether or not we agree with the philosophy of the decisions of the United States Supreme Court is not the point. The fact is that when the *Spector* case reached that Court for its final determination—many years after *Berwind-White*—the views expressed by Judge Clark, namely, [fol. 289] that state taxation of net income produced by a corporation engaged solely in interstate commerce with no local incidents except the commerce itself, is subject to tax, were repudiated. *Alpha* and *Cheney* and the governing principles therein were expressly reaffirmed. Whether or not the tax is fairly apportioned is unimportant for the Supreme Court in *Spector* there said:

> "The constitutional infirmity of such a tax persists no matter how fairly it is apportioned • • • "

The *Berwind-White* case involved nothing more than a sales tax. It was no different than if Minnesota placed a sales tax on cement shipments to points within this state. If Minnesota did adopt such a sales tax, no one now would even question its constitutionality. The Supreme Court of the United States sustained the sales tax in *Berwind-White* as a tax "conditioned upon a local activity"—namely—"delivery of goods within the state upon their purchase for consumption." (309 U.S. 33, 58; 60 S. Ct. 388, 398). Since *Berwind-White* was decided, the language found in the opinion of that case has been carefully circumscribed by the Supreme Court. It cannot now be cited as authority in support of a tax on interstate commerce as distinguished from local; commerce or activities.

Thus, in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S. Ct. 815 (1947), the Court struck down [fol. 290] as violative of the Commerce Clause a tax on the gross receipts of a stevedoring company. The Court squarely met the contention that under the *Berwind-White* decision the tax was constitutional. In doing so the Court stated (67 S. Ct. 815, 819):

> "* * * where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy [citing Berwind-White]. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit."

And at 67 S. Ct. 820, the Court further observed:

> "When we examine the Berwind-White tax on the purchasers of tangible personal property for consumption, there is the same reliance upon the local character of the sale."

In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170, 74 S. Ct. 396, 403 (1954), the Court again had occasion to observe that *Berwind-White* involved a tax on a local activity which was not a part of interstate commerce.

The Court stated with reference to *Berwind-White*:

> "Also distinguishable is McGoldrick v. Berwind-White Coal Mining Co., 1940, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, involving a tax on the sale of goods for consumption, imposed by the city in which the goods had come to rest. The Court there found that commerce, as to the goods, had ended prior to the taxable [fol. 291] event, and likened the tax to an ad valorem one on property."

All revenues of Northwestern States which the state here seeks to tax were produced from, and all activities were and are an integral part of interstate commerce. There are no local activities as such here as distinguished from interstate commerce. The lower court found none and so made its unchallenged finding. There is not even any dispute as to these facts. There is no claim that the revenue which the state seeks to tax was produced after the goods moving in interstate commerce had come to rest. As the Supreme Court pointed out in *Spector* "The incidence of the tax is upon no intrastate activities because there are none."

This Court in its majority opinion makes the following assertion:

> "Taxpayer contends, however, that since the rendition of the decision in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. ed. 573, no tax, even though it be fairly apportioned and nondiscriminatory, may be levied on the net income of a foreign corporation engaged exclusively in interstate commerce."

It is submitted that taxpayer has never made any such claim. For instance, on page 17 of taxpayer's reply brief, submitted before oral argument was had, the following statement was made:

> "Appellant [taxpayer] does not claim that there are [fol. 292] no situations in which a state can impose a tax measured by net income on an exclusively interstate commerce taxpayer. * * * "

There is no question that net income produced from interstate commerce may be the measure of a tax imposed by a state—provided, always, however, and this is an absolute prerequisite—that something more than interstate commerce can be found—namely some local contact with the taxing state.

As the taxpayer pointed out in its reply brief:

> "However, before such a tax can be constitutionally levied, the taxing state must afford some privilege or protection which the commerce clause would permit it to withhold if it elected to do so.
>
> "Thus, for example, Minnesota is permitted to levy a gross earnings tax against railroads doing an interstate business in Minnesota (Minnesota Statutes, Chap. 295). The subject matter of that tax, however, is not the right of the railroad to do interstate business in this state or to earn income therefrom, but the right to own and peacefully possess under the police protection of the state, real and personal property in Minnesota * * *. Cudahy Packing Co. v. State of Minnesota, 38 S. Ct. 373, 246 U. S. 45; Great Northern Railway Co. v. State of Minnesota, 49 S. Ct. 191, 278 U S 503. So too might a state income tax levy on a corporation doing solely interstate business be sustainable if the corporation be incorporated under the laws of the taxing state so that its very privilege of existing [fol. 293] is granted by the State and therefore a valid subject of the State's taxing power. See United States Glue Company v. Oak Creek, 247 U.S. 321, 38 S. Ct. 499 (1918)."

The *Oak Creek* case is a perfect example of the right of a state to tax interstate commerce. There, however, the taxing state, that is, Wisconsin, was the domiciliary state—and gave the corporation its franchise—its very existence. Here Minnesota has given the taxpayer nothing—for its right to sell in the state of Minnesota, is a privilege granted to it by the Federal Constitution—not by Minnesota.

The importance of the need for the protection granted by the Commerce Clause is pointed up in the considerable

amount of publicity that has been given this case. Some of that publicity demonstrates the very reason why our founding fathers insisted upon the Commerce Clause being a part of the Federal Constitution. Thus, for example, in a recent editorial entitled "Landmark Tax Case" in the Minneapolis Star (June 28, 1957) the editor made the following observations respecting this case:

> "For Minnesota, a favorable decision in the highest court will mean more revenue. In the view of some officials, it probably also will mean the establishment of more business branches in this state by outside companies which have shunned such branches to avoid paying the Minnesota income tax. If they must pay the tax anyway, they may change their policy on branch establishments."

[fol. 294] It is that type of reasoning that brought about the adoption of the Commerce Clause as part of the Constitution. The author of that editorial however, also emphasized that if Minnesota can impose a tax on business engaged in interstate commerce, other states likewise may very well adopt retaliatory legislation, for the editor states:

> "California has an income tax law which similarly applies to outside businesses, and other income tax states probably will consider such provisions if the Minnesota law is upheld."

The Commerce Clause was obviously adopted to prevent just such interference with the free flow of commerce between the states. That is why the United States Supreme Court has so jealously guarded this provision of the Constitution, without which commerce between the states would cease. Obviously states such as Minnesota, instead of receiving more revenue as some seem to think it would, instead will, if retaliatory legislation is adopted by other states, actually lose tax revenue. Minnesota is an exporting state. Its industries rely greatly on customers outside of its borders.

Certainly our legislators never intended that our taxing statutes be interpreted in a manner that would invite re-

taliatory tax statutes from the entire nationwide area wherein Minnesota enterprises export their products out of this state. Minnesota is an exporting state relying principally on customers in other states for its business exist-
[fol. 295] ence, for as Professor Lewis states in his recent comprehensive study:

> "There is a steady flow of trade across the borders of the State of Minnesota which approximates 135 million tons annually. Three-fourths of this traffic is outbound and one-fourth is in-bound." (Minnesota Interstate Trade, Edwin H. Lewis, University of Minnesota Studies in Economics and Business, The University of Minnesota Press, Nov. 16, 1953).

According to the same study 97,209,000 tons of interstate trade originated in Minnesota in 1950 and only 35,306,000 tons terminated here. In carload shipments by rail alone in the same year 42,435,600 tons originated here for points outside and only 18,028,000 tons terminated in this state. See: ICC Carload Waybill Analysis, Table I, Appendix, Minnesota Interstate Trade by Professor Edwin H. Lewis.

It is this flow of commerce between the states that the United States Supreme Court has said cannot be interrupted, impeded, or taxed by a state. To do so would create the same type of trade barriers that has for years retarded normal industrial progress between the European countries.

It is perhaps needless to point out, as the study of Professor Lewis indicates, that Minnesota has many well known national manufacturing companies whose product obviously is not all marketed in Minnesota, but quite to the contrary the greater bulk of that product is marketed else-
[fol. 296] where. If the Commerce Clause is to be construed as has been done in this case, then obviously it would be to the advantage of national manufacturing companies who otherwise would build or expand their plants in Minnesota, to build and expand those plants in those localities where they have their market. Certainly other states can tax interstate commerce originating in Minnesota and

marketed in those states if this state can tax such commerce originating in another state, as this decision has held. The Commerce Clause was designed to prevent this sort of thing from happening.

It is submitted that the petition for reargument should be granted, or in the alternative that the decision should be reconsidered.

Respectfully submitted,

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[fol. 296a] [File endorsement omitted]

Proof of service (omitted in printing).

[fol. 296b] [File endorsement omitted]

[fol. 296c] STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA, Respondent,

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

ANSWER TO PETITION FOR REARGUMENT—Filed August 27, 1957

The petitioner, Northwestern States Portland Cement Company, petitions for reargument on the grounds that:

(1) The majority opinion incorrectly adopts a construction of *Minnesota Statutes,* Section 290.03, which is contrary to the express language of the statute, which construction was not heretofore argued by either party.

(2) The majority opinion incorrectly decides important Federal constitutional questions of great public interest which deserve further consideration by the Court.

We submit that the petitioner has failed to present any new authority or any argument which was not previously advanced and therefore its petition for reargument should be denied.

[fol. 296d] With respect to the first issue the petitioner confuses "local business" with "localized activities and transactions" which the Court uses in discussing the due process requirements. We are unable to find any place where the Court stated that the petitioner was carrying on a "local business" within Minnesota. Although the Court has repeatedly said the petitioner's activities within Minnesota have been exclusively interstate commerce, it had to take into consideration its local activities in deciding the due process question.

As has been stated in the respondent's brief at page 27:

> "In considering whether a particular tax is to fall under the due process clause, the question for determination is whether the tax as imposed taxes values beyond the territorial jurisdiction of the state imposing the tax. Thus, does the tax have any relation to opportunities, benefits, or protection conferred or afforded by the taxing state?"

The petitioner in its (appellant's) brief also admitted that local activities are an issue in the due process question, when it stated on page 28:

> "This statute (Section 290.02) purports to lay a tax on the net income of a foreign corporation engaged exclusively in interstate commerce. An analysis of the decisions makes it clear that before a state can tax a foreign corporation engaged in interstate commerce, it must find some local activities of the cor-

[fol. 296e] poration which are sufficient to bring the foreign corporation within the taxing power of the state. In the absence of any such local incidents, the state has no local grip on the company and the attempted imposition of taxes on it is a taking of property without due process of law and accordingly void."

The Court, in its analysis of the due process objection, in discussing the income producing activities in this state repeatedly referred to them as "localized activities and transactions within the state".

On pages 9 and 10 of its decision, the Court stated:

"A non-discriminatory state tax upon the net income of a foreign corporation engaged *solely* in interstate business, which is fairly apportioned to and measured by that part of the net income which is derived from business done within the state, contravenes neither the due process clause nor the commerce clause, where the incidence or subject of the tax is not the privilege of either engaging in, or continuing to engage in, interstate commerce, but is instead those income-producing activities and transactions which, though indirectly related to interstate commerce, have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy the benefits and advantages of, a local business, and which as localized commerce ought to pay their own way and not place other local business at a competitive disadvantage.

[fol. 296f] "We can only conclude that the taxpayer has sufficient factual connections with localized activities and transactions within the state to comply with the requirements of due process."

Both parties are agreed that to satisfy the due process clause there must be some minimal connection between petitioner's activities and the state. It is therefore proper for the Court to discuss local activities and we submit that the Court has adequately considered this issue and reached the right conclusion.

The petitioner states that with respect to *Minnesota Statutes*, Section 290.03, it has been construed to apply to interstate commerce only when it is so extensive that it has become localized. The Court, on page 14, stated:

> "As applied to nonresident taxpayers engaged in interstate commerce, it is confined to that portion of their income earned from business activities which are fairly apportioned to, and localized within, the state."

An analysis of the factors used in computing the tax will demonstrate that only local activities are taken into consideration in computing the tax. The tax is computed by dividing a taxpayer's net income by the ratio that taxpayer's Minnesota property, Minnesota payroll and Minnesota sales bears to the total property, payroll and sales. It necessarily follows that if a taxpayer has no Minnesota property, payroll or sales but merely ships goods through [fol. 296g] the state there will be no tax due to Minnesota. It also follows that to the extent that its Minnesota property, payroll and sales bear to total property, payroll and sales its net income will be apportioned to Minnesota.

The petitioner attempts to distinguish the cases relied upon by the Court. It fails, however, to present any new cases or any new argument not advanced in its earlier briefs. Our arguments on these cases have been set out in our earlier briefs and we feel nothing will be gained by restating them here. We submit that the Court has carefully considered in its decision all the case law on the questions at issue and the arguments of both parties. Since nothing new has been presented, there is no reason why the matter should be reconsidered or reargued.

The petitioner, on page 12, states:

> "This Court in its majority opinion makes the following assertion: 'Taxpayer contends, however, that since the rendition of the decision in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573, no tax, even though it be fairly apportioned and non-discriminatory, may be levied on the net income of a foreign corporation engaged exclu-

sively in interstate commerce.' It is submitted that taxpayer has never made any such claim."

While we feel that the exact nature of the petitioner's assertions are irrelevant since the Court has thoroughly considered this aspect, we submit the petitioner is in error. [fol. 296h] In the first place, he has taken a part of the decision out of context. The Court immediately after the language cited above went on to say in the next sentence:

> "It is the position of the taxpayer that such a tax may be levied only in those cases where the foreign corporation is engaged in both intrastate and interstate commerce. We cannot agree with this interpretation of the Spector case."

We submit that the Court was correct in these statements.

The petitioner has on several occasions cited authority in an attempt to sustain the position that a corporation engaged exclusively in interstate commerce cannot be taxed under any circumstances.

The petitioner, in its (appellant's) brief at page 53, stated:

> "Since the Spector case, the Supreme Court has again and again reaffirmed that a corporation engaged exclusively in interstate commerce in a particular state cannot be taxed on that commerce by that state under any circumstances."

Again in the last paragraph of its argument, on page 60, the petitioner (appellant) in contending that interstate commerce cannot be taxed, stated:

> "As indicated heretofore, the Supreme Court in reversing the Court of Appeals in the Spector case, [fol. 296i] held that the Alpha case did foreclose all further discussion. Under that rule no state can impose an income tax on a foreign corporation whose only business in the state is exclusively interstate in

character. 'The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state.' (Spector Motor Service, supra, 71 S. Ct. at 512)."

In any event, the Court has thoroughly analyzed and considered the commerce clause question. This is clearly shown by its analysis of the *Spector* case where the Court stated:

"The Spector case did not turn on the fact that the foreign corporation was *solely* engaged in interstate commerce. The nub of the decision is that a net-income tax, even though it be fairly apportioned and nondiscriminatory, may not be imposed on the *privilege* of engaging in business that is exclusively interstate in character. * * * Since the incidence of the tax in the Spector case was the *privilege* itself of engaging in interstate commerce, it fell before the commerce clause. The court carefully distinguished those cases in which, as an exception to the general rule that no tax may be levied upon the *privilege* of engaging in interstate commerce, a state, where a taxpayer is engaged in both intrastate and interstate commerce, is permitted to tax the *privilege* of carrying on intrastate business and, within reasonable limits, is permitted to apply a fair proportion of the tax to the taxpayer's business which is done within the state. The court [fol. 296j] refused to extend the application of these hybrid cases to a taxpayer, like Spector, who is engaged exclusively in interstate commerce. * * * It follows that the Spector decision makes it reasonably clear that there is a constitutional channel for making interstate commerce pay its own way and that this channel gives the state a right to impose taxes upon other activities and aspects of the interstate commerce business which, unlike the *privilege* of doing interstate business, are subject to the sovereign power of the state despite the fact that such taxes may be derived out of income from interstate business."

We submit, therefore, that the Court correctly summarized the taxpayer's contentions, and so thoroughly analyzed the commerce clause question, that there is absolutely no basis for reconsideration.

On page 14 of its brief, the petitioner cites a portion of an editorial from the Minneapolis Star (June 28, 1957) to illustrate the consequences of this case and the need for commerce clause protection. Since this editorial has been interposed as an argument, we feel it should be set out in full.

> "At the recent national convention of state tax commissioners much of the conversation revolved about a June 14 decision of the Minnesota supreme court. The decision said that the Northwestern States Portland Cement Co. of Mason City, Iowa, must pay a Minnesota income tax of $112,000 on the business it did [fol. 296k] in this state between 1933 and 1948.
>
> "The Minnesota income tax law, which went into effect in 1933, applies to corporations outside the state which own property in Minnesota or do business here. Some such corporations have been paying the tax, many have not. The cement company, which refused to file returns in Minnesota, contended that it is engaged in interstate commerce and that its Minnesota business actually was transacted at Mason City, thus the Minnesota tax commissioner has no jurisdiction.
>
> "The state pointed out that the company has an office in Minneapolis, has five salesmen in Minnesota and delivers a considerable quantity of cement in this state. The state based its case largely on the allegation that the cement company systematically solicits business in Minnesota and maintains a continuous flow of merchandise into the state.
>
> "This may indicate that the state tax commissioner will not try to collect an income tax from outside corporations which do business with Minnesotans only occasionally. But if the state supreme court decision is upheld by the United States supreme court, then many other outside companies will be required to file Minnesota income tax returns.

> "California has an income tax law which similarly applies to outside businesses, and other income tax states probably will consider such provisions if the Minnesota law is upheld. Among tax officials the Minnesota litigation is looked upon as a 'landmark' case, [fol. 296-l] one which will greatly clarify the tax obligations of interstate commerce to the states where it operates.
>
> "For Minnesota, a favorable decision in the highest court will mean more revenue. In the view of some officials, it probably also will mean the establishment of more business branches in this state by outside companies which have shunned such branches to avoid paying the Minnesota income tax. If they must pay the tax anyway, they may change their policy on branch establishments.
>
> "On the other hand, the decision could have the effect of limiting Minnesota's attractiveness as a state in which non-Minnesota concerns wish to do business, unless other states adopt similar legislation."

The editorial is merely a review of the facts of the case and a discussion of possible consequences, some favorable to Minnesota and others unfavorable, in which the editor does not express an opinion or a conclusion. We, therefore, submit that it adds nothing. While consequences are usually not a factor in determining a legal question if they are a consideration in this case we feel that the Supreme Court was well aware of the implications of their decision respecting commerce. The Court, in its decision, set out the following language from the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 46, 60 S. Ct. 388, 392, 84 L. Ed. 565, 570, 128 A. L. R. 876, 880:

> [fol. 296m] " * * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress

> A tax may be levied on net income wholly derived from interstate commerce. Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation."

The Court in discussing the impact on interstate commerce summarized it as follows:

> "Clearly, a net-income tax places no burden upon interstate commerce. The tax is levied after the interstate commerce transactions localized within the state have been completed, and after all expenses are paid and losses adjusted, and after the taxpayer, as the recipient of the remaining net income, is free to use it as he chooses. Thus the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow."

It is clear, therefore, that the Court has thoroughly considered the burden of the tax at issue on interstate commerce.

[fol. 296n] It is respectfully submitted, therefore, that in view of the fact that no new arguments or authority have been submitted, that the petition for reargument or reconsideration should be denied.

Respectfully submitted,

Miles Lord, Attorney General, Perry Voldness, Assistant Attorney General, Arthur C. Roemer, Special Assistant Attorney General, 156 East Sixth Street, Saint Paul 1, Minnesota, Attorneys for Respondent.

[fol. 297]

IN SUPREME COURT OF STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINN.

[Title omitted]

ORDER DENYING PETITION FOR REARGUMENT—Aug. 28, 1957

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

Mae Sherman, Clerk Supreme Court.

[fol. 298]

IN SUPREME COURT STATE OF MINNESOTA

STATE OF MINNESOTA, Respondent,

36826 v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

JUDGMENT—September 10, 1957

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of Two Hundred Thirty and 40/100

Dollars, ($230.40) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed September 10, 1957.

By the Court

Attest:

Mae Sherman, Clerk.

STATEMENT FOR JUDGMENT

Statutory Costs $25.00
Printer $205.40
Total $230.40

Satisfaction of Judgment filed

Therefore the above judgment is duly satisfied in full and discharged of record

Attest: Clerk.

By Deputy.

[fol. 299] [File endorsement omitted]

IN SUPREME COURT STATE OF MINNESOTA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 12, 1957

I. Notice is hereby given that Northwestern States Portland Cement Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Minnesota entered in this action on September 10, 1957, affirming the judgment of the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) The full and complete record of the trial court proceedings in this action, including the complaint and answer and the transcript of all testimony and [fol. 300] evidence presented therein, together with the Trial Court's Findings of Fact, Conclusions of Law and Order for Judgment dated August 31, 1955; the memorandum of the Court attached thereto; the motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment; Amended Findings of Fact, Conclusions of Law and Order for Judgment dated October 11, 1955; the Judgment of the District Court entered by the Clerk of District Court of Hennepin County, State of Minnesota, dated November 4, 1955; and the Notice of Appeal, to the Supreme Court of the State of Minnesota dated November 9, 1955.

(2) The majority and dissenting Opinions and final Judgment rendered by the Supreme Court of the State of Minnesota in this action.

(3) The Petition for Reargument filed with the Supreme Court of Minnesota on July 25, 1957, and the Order of the Supreme Court of Minnesota denying said Petition for Reargument, filed August 28, 1957.

(4) The following original exhibits introduced in and made a part of the evidence in this action:

Exhibit 1 Certificate from the Secretary of State of the State of Minnesota indicating that Northwestern States Portland Cement Company has not qualified to do business in the State of Minnesota.

Exhibit 2 Appellant's Certificate of Incorporation as Iowa corporation.

[fol. 301]

Exhibit	3	Certificate of Charter issued by the Secretary of State of the State of Iowa extending the corporate life of appellant.
Exhibit	4	Order form carried by salesman.
Exhibit	5	Order form used in Minneapolis office.
Exhibit	6	Report of shipments made to customers.
Exhibit	7	List of orders sent from Minneapolis office.
Exhibit	8	Acknowledgment of receipt of order.
Exhibit	11	Original invoice mailed to customer.
Exhibit	12	Acknowledgment of customer's order.
Exhibit	14	Form for quoting prices to customer.
Exhibit	15	Credit slip.
Exhibit	16	Quotation to Line Yard customers.
Exhibit	17	Quotation on specific work.
Exhibit	18	Contract of Purchase between appellant and a dealer.
Exhibit	19	Contract record for shipping purposes.
Exhibit	20	Contract of Purchase between appellant and purchasers.
Exhibit	26	Requisition form for advertising material.

III. The following questions are presented by this appeal.

A. Is Section 290.03 of the *Minnesota Statutes* (1953), under which the State of Minnesota seeks to impose a tax on the net income of the appellant, in conflict with and thus invalid and void under the Due Process Clause of the Fourteenth Amendment of the

[fol. 302] Constitution of the United States where the tax imposed is upon net income arising out of sales and activities consummated exclusively without and beyond the State of Minnesota, and where appellant is a foreign corporation that has never qualified to do business in Minnesota, and its only contact with the State of Minnesota has been the presence of its solicitors within the state.

B. Is Section 290.03 of the *Minnesota Statutes* (1953) in conflict with and thus invalid and void under the Commerce Clause, Article I; Section 8, Clause 3 of the Constitution of the United States insofar as it imposes a tax on the net income of the appellant, a foreign corporation, whose only activities in the State of Minnesota were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce.

C. Did the Minnesota Court unconstitutionally assert jurisdiction over the appellant corporation, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, where the appellant corporation was not, at the time of attempted service of process or any time prior thereto, engaged in doing business within the State of Minnesota, and where appellant's only contact with [fol. 303] the State of Minnesota was the presence of its solicitors within the state.

s/ Joseph A. Maun, 425 Hamm Building, Saint Paul 2, Minnesota, Attorney for Northwestern States Portland Cement Company, Appellant.

Of Counsel:

Bundlie, Kelley and Maun, 425 Hamm Building, Saint Paul 2, Minnesota, Smith & Beck, 505 First National Bank Building, Mason City, Iowa.

Proof of service (omitted in printing).

[fol. 304] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 305] [File endorsement omitted]

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA, Respondent,

36826 v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

MOTION—Filed December 9, 1957

Now comes the Appellant, Northwestern States Portland Cement Company, and based upon all the proceedings of record in the above entitled case, respectfully moves this Court for its Certificate setting forth that its decision in the above entitled case entered on September 10, 1957 was based upon the determination of a substantial and important federal question.

Dated this 6th day of December, 1957.

Joseph A. Maun, 425 Hamm Building, Saint Paul 2, Minnesota, Counsel for Appellant.

Of Counsel:

Bundlie, Kelley and Maun, 425 Hamm Building, Saint Paul 2, Minnesota.

[fol. 306] [File endorsement omitted]

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA, Respondent,

36826 v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant.

CERTIFICATE—Filed December 12, 1957

On motion of the Appellant, Northwestern States Portland Cement Company, this Court, in addition to its decision and orders made herein, orders it to be certified and made part of the record in this case and of the judgment heretofore rendered herein, that in its appeal from the District Court of Hennepin County, Minnesota, and in the argument both oral and by brief, made in this Court, the Appellant raised and relied upon the assertion that the statute, Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1; coded as Minnesota Statutes, §290.03, sought to be enforced by the Respondent, was repugnant to and void under the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the [fol. 307] United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. It is further certified that the issues as thus presented in this case, made it incumbent upon this Court, as part of its decision, to render its determination with respect to a substantial and important federal question, namely, whether Respondent's enforcement of Minnesota Statutes §290.03, [Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended

in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1,] was in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and the decision of the Court in this case is based in substantial part upon that determination. This certificate is not to be construed as a modification of the aforesaid decision.

Dated this 12 day of December, 1957.

SUPREME COURT OF MINNESOTA

Roger Dell, Chief Justice.

[fol. 308] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 309]

SUPREME COURT OF THE UNITED STATES

No. 606—October Term, 1957.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY, Appellant,

v.

STATE OF MINNESOTA.

ORDER NOTING PROBABLE JURISDICTION—January 6, 1958

The statment (sic) of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Note

Pages 305, 316, 317, 318, 319, 322, 323, 324, 325, 326 are on Card 6.

[fol. 311]

DEFENDANT'S EXHIBIT 2

(J)

3261

IOWA

SECRETARY OF STATE

RENEWAL, AMENDED & SUBSTITUTED ARTICLES

CORPORATE CHARTER

December 22nd, 19 50.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
Mason City, Iowa

has filed articles of incorporation in this office and is hereby authorized to transact business as a corporation from November 8th, *19* 50 *Perpetually.*

Fees Paid:

Filing . . $ 22.00

Recording $ 2.25

SECRETARY OF STATE

311

[fol. 312]

DEFENDANT'S EXHIBIT 3

STATE OF IOWA

STATE DEPARTMENT.

I Hereby Certify that the

Number 41526

*** NORTHWESTERN STATES PORTLAND CEMENT COMPANY ***

of *** MASON CITY *** Iowa a corporation organized under the laws of the STATE OF IOWA has filed in this office Articles of Incorporation and paid the fees as provided by law.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the seal of my office. Done at Des Moines the capital this 8 day of NOVEMBER A.D. 30

Ed M. Smith
Secretary of State.

By Earl C. Ryan
Deputy

Expires NOVEMBER 8 A.D. 50

(312)

[fol. 312a]

DEFENDANT'S EXHIBIT 4

100—FORM S6—4-52—S.P.CO.

Northwestern States Portland Cement Co.
MASON CITY, IOWA

_____ 195_____
(Date)

Invoice to _____

Address _____

Ship to _____
(Name)

Destination _____

Date of Shipment _____

Route _____

BBLS.	COMMODITY	TYPE PACKAGE	PRICE F. O. B. DEST.
	Standard Portland Cement		
	Plastolith Portland Cement		
	High Early Strength Cement		
	Masons Cement	Paper	

Terms and conditions printed on reverse side of this order are made a part hereof as fully as if written here.

All orders subject to acceptance in writing by Northwestern States Portland Cement Company, General Office, Mason City, Iowa.

Signed: _____

_____

Salesman _____

[Fol. 313] (309)

TERMS AND CONDITIONS

TERMS OF PAYMENT:— On approved credit net cash 30 days from date of invoice, or 10c per barrel discount for cash in 15 days from date of invoice, on Portland, Plastolith, High Early Strength or Masons Cement.

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

313

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

[fol. 317]

DEFENDANT'S EXHIBIT 5

5M—FORM 86—4-54—S.P.CO.

Northwestern States Portland Cement Co.
MASON CITY, IOWA

_____ 195___
(Date)

Invoice to _____

Address _____

Ship to _____
(Name)

Destination _____

Date of Shipment _____

Route _____

BBLS.	COMMODITY	TYPE PACKAGE	PRICE F. O. B. DEST.
	Standard Portland Cement		
	Plastolith Portland Cement		
	High Early Strength Cement		
	Masons Cement	Paper	

Terms and conditions printed on reverse side of this order are made a part hereof as fully as if written here.

All orders subject to acceptance in writing by Northwestern States Portland Cement Company, General Office, Mason City, Iowa.

Signed: _____

_____

Salesman _____

317

[fol. 318] (p. 311)

TERMS AND CONDITIONS

TERMS OF PAYMENT:— On approved credit net cash 30 days from date of invoice, or 10c per barrel discount for cash in 15 days from date of invoice, on Portland, Plastolith, High Early Strength or Masons Cement.

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

312

[fol. 319]

DEFENDANT'S EXHIBIT 6

520-2M-4-53-S.P.Co.

DAILY LOADING RECORD

NORTHWESTERN STATES PORTLAND CEMENT COMPANY

SALES DEPARTMENT

Mason City, Iowa_____

To MINNEAPOLIS OFFICE,
Minneapolis, Minnesota

Below you will find listed, cars loaded and billed today to points in Minnesota and North Dakota.

CUSTOMER	DESTINATION	BBLS.	INITIAL	CAR NO.	ROUTING

[fol. 320]

DEFENDANT'S EXHIBIT 7

Form S-54-286-8-47-S.P.Co.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY

Minneapolis, Minnesota

To SALES DEPARTMENT
Mason City, Iowa

We are forwarding you today, orders as shown below:

ORDER NO.	BBLS.	CUSTOMER	DESTINATION	TIME OF SHIPMENT

[fol. 321]

DEFENDANT'S EXHIBIT 8

S31-5M-5-33-S.P.Co.

ACKNOWLEDGMENT OF ORDER

NORTHWESTERN STATES PORTLAND CEMENT CO

MASON CITY, IOWA

Order No.

Your order
has been received and in accordance therewith we will ship

To

Destination

Via , the following items:

Bbls.	NORTHWESTERN PORTLAND CEMENT per standard barrel of 376 pounds net.	in paper	$
Bbls.	NORTHWESTERN PLASTOLITH AIR-ENTRAINING PORTLAND CEMENT Per standard barrel of 376 pounds net.	in paper	$
Bbls.	NORTHWESTERN HIGH EARLY STRENGTH PORTLAND CEMENT per standard barrel of 376 pounds net.	in paper	$
Bbls.	NORTHWESTERN MASONS CEMENT per barrel of 280 pounds net.	in paper	$

These prices are f. o. b. cars destination shown above.
This order is subject to the terms and conditions printed on the back hereof.

We appreciate this order and trust we may receive your further favors.

Yours very truly,

NORTHWESTERN STATES PORTLAND CEMENT CO.

(321)

[fol. 322]

TERMS AND CONDITIONS

TERMS OF PAYMENT:— On approved credit net cash 30 days from date of invoice, or 10c per barrel discount for cash in 15 days from date of invoice, on Portland, Plastolith, High Early Strength or Masons Cement.

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require ayments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

(322)

[fol. 328]

DEFENDANT'S EXHIBIT 12

E-Z-OUT
REG. U.S. PAT. OFF.

Form S-23 10M 3-54

NORTHWESTERN STATES PORTLAND CEMENT CO.
MASON CITY, IOWA

TER
LOAD ORDER
NO. 08218

DATE

TO

TO BE
SHIPPED

YOUR ORDER

ACKNOWLEDGMENT

YOUR ORDER HAS BEEN RECEIVED AND IN ACCORDANCE
WE WILL SHIP

SPECIAL INSTRUCTIONS

TO

DESTINATION

ROUTE

*PLUS 15% INCREASE IN FREIGHT CHARGES
AND 3% GOV'T TAX ON ALL CHARGES.

BARRELS	COMMODITY		NET WEIGHT PER BARREL	RATE CWTS	PRICE F.O.B. DESTINATION
	Northwestern Portland Cement	In Paper	376 Pounds		$ Per Bbl.
	Northwestern Plastolith Air Entraining Portland Cement	In Paper	376 Pounds		$ Per Bbl.
	Northwestern High Early Strength Cement	In Paper	376 Pounds		$ Per Bbl.
	Northwestern Masons Cement	In Paper	280 Pounds		$ Per Bbl.
	White Cement	In Paper	376 Pounds		$ Per Bbl.

Prepaid

This order is subject to terms and conditions on back thereon.
We appreciate this order and trust we may receive your further favors.

Yours very truly,
NORTHWESTERN STATES PORTLAND CEMENT CO.

328

BARGO INC. - CHICAGO

[fol. 329]

-OUT
PAT. OFF.

NORTHWESTERN STATES PORTLAND CEMENT CO.
MASON CITY, IOWA

TER
LOAD ORDER
NO. 08218

INVOICE TO

ADDRESS

TO

DESTINATION

DESTINATION

DATE
TO BE
SHIPPED
CUSTOMER'S NO.

SPECIAL INSTRUCTIONS

*PLUS 15% INCREASE IN FREIGHT CHARGE
AND 3% GOV'T TAX ON ALL CHARGES.

ROUTE

SAMPLED BY

CREDIT O.K.

BARRELS	SACKS	COMMODITY	Weight	RATE CWT.	PRICE F.O.B. DESTINATION
		Standard Portland Cement In Paper			$ Per Bbl.
		Plastolith Portland Cement In Paper			$ Per Bbl.
		High Early Strength Cement In Paper			$ Per Bbl.
		Masons. Cement In Paper			$ Per Bbl.
		White Cement In Paper			$ Per Bbl.
				Prepaid	

SHIPPED _____ IN CAR _____

329

[fol. 344]

TERMS AND CONDITIONS

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

All orders subject to acceptance in writing by

NORTHWESTERN STATES PORTLAND CEMENT COMPANY

General Office — Mason City, Iowa

344

[fol. 310]

DEFENDANT'S EXHIBIT 1

United States of America.

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, Mrs. Mike Holm, Secretary of State of the State of Minnesota, keeper of the Great Seal of said state and custodian of the documents pertaining to the formation of corporations under, and the compliance of foreign corporations with, the laws of this state, do hereby certify:

That I have made due and diligent search of the files and records in this office, and such search fails to reveal any record of a domestic corporation by the name of "Northwestern States Portland Cement Co.", as ever having been made, or that a foreign corporation of that name has ever made compliance with the laws of this state relating to foreign corporations.

WITNESS my official signature hereunto subscribed and the Great Seal of the State of Minnesota hereunto affixed this fifth day of November, A. D. 1954.

Mrs. Mike Holm

Secretary of State

[fol. 322a]

DEFENDANT'S EXHIBIT 11

05088

E-Z OUT
REG U S PAT OFF

FORM A-19 10M 1-58

ORIGINAL INVOICE

(NAME OF CARRIER)

Northwestern States Portland Cement Co.
MASON CITY, IOWA

SOLD TO

Cust. Order No.
Price F.O.B. Destination
Contract No.

Consigned to

Destination
Route
Del. Carrier

Shipping Date
Invoice No.
L. O. No.
Car Initials. No.

NO. PACKAGES	ITEM	WEIGHT	RATE	BARRELS	PRICE	AMOUNT
	Paper Sacks Northwestern Portland Cement					
	Northwestern Portland Cement in Bulk					
	Paper Sacks Northwestern Portland Plastolith Cement					
	Northwestern Portland Plastolith Cement in Bulk					
	Paper Sacks Northwestern High Early Cement					
	Northwestern High Early Cement in Bulk					
	Paper Sacks Northwestern Masons Cement					

Terms: 30 days net: Discount amounting to If paid within 15 days from date of invoice.

The seller represents that the prices charged in this invoice do not exceed the applicable maximum prices, if any, permitted by Government Price regulations.

We hereby certify that these goods were produced in compliance with all applicable requirements of Sections 6, 7 and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under Section 14 thereof.

ALL ARRANGEMENTS MADE CONTINGENT UPON STRIKES OR CAUSES BEYOND OUR CONTROL

3252

BASCO INC. - CHICAGO

317

[fol. 325]

05088

E-Z-OUT
REG. U. S. PAT. OFF.

FORM A-19 10M 1-52

Carrier's No.

(NAME OF CARRIER)

STRAIGHT BILL OF LADING - SHORT FORM

ORIGINAL — NOT NEGOTIABLE

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at Mason City, Iowa

FROM **Northwestern States Portland Cement Co.**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination. If on its route, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western, Illinois and Uniform Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

†This shipment is correctly described and weight shown is shipper's, subject to verification by Western Weighing & Inspection Bureau, according to Agreement No. 1708.
†(Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission.)

†This is the property of the shipper, and no reconsignment or diversion is to be made unless authorized by the consignor.

Consigned to

Destination

Route

Del. Carrier

Shipping Date

Invoice No.

L. O. No.

Car Initials No.

NO. PACKAGES	Kind of Package, Description of Articles, Special Marks, and Exceptions	# WEIGHT	# RATE	
	Paper Sacks Northwestern Portland Cement Northwestern Portland Cement in Bulk Paper Sacks Northwestern Portland Plastolith Cement Northwestern Portland Plastolith Cement in Bulk Paper Sacks Northwestern High Early Cement Northwestern High Early Cement in Bulk Paper Sacks Northwestern Masons Cement			

(# † Plus 15% increase in freight charges. Plus 3% Gov't tax on all charges.)

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight. NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated

by the shipper to be not exceeding per

Northwestern States Portland Cement Co., Shipper

Per

Permanent post-office address of shipper: MASON CITY, IOWA

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Northwestern States Portland Cement Co.

Per

(Signature of consignor.)

Per

Agent

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges advanced: $

325

HARCO INC. - CHICAGO

318

[fol. 326]

05088

FORM A-19 10M 1-53

(NAME OF CARRIER)

Carrier's No.

THIS SHIPPING ORDER MUST BE LEGIBLY FILLED IN, IN INK, IN INDELIBLE PENCIL, OR IN CARBON, AND RETAINED BY THE AGENT.

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this shipping order, at Mason City, Iowa

FROM Northwestern States Portland Cement Co.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western, Illinois and Uniform Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

†This shipment is correctly described and weight shown is shipper's, subject to verification by Western Weighing & Inspection Bureau, according to Agreement No. 1708.
†(Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission.)

†This is the property of the shipper, and no reconsignment or diversion is to be made unless authorized by the consignor.

Consigned to

Destination

Route

Del. Carrier

Shipping Date

Invoice No.

L. O. No.

Car Initials No.

NO. PACKAGES	Kind of Package, Description of Articles, Special Marks, and Exceptions	* WEIGHT	# RATE	
	Paper Sacks Northwestern Portland Cement Northwestern Portland Cement in Bulk Paper Sacks Northwestern Portland Plastolith Cement Northwestern Portland Plastolith Cement in Bulk Paper Sacks Northwestern High Early Cement Northwestern High Early Cement in Bulk Paper Sacks Northwestern Masons Cement			

(# † Plus 15% increase in freight charges. Plus 3% Gov't tax on all charges.)

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight. NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated

by the shipper to be not exceeding per

Northwestern States Portland Cement Co., Shipper

Per

Permanent post-office address of shipper: MASON CITY, IOWA

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Northwestern States Portland Cement Co.

Per

(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges advanced: $

☞ AGENT MUST DETACH AND RETAIN THIS SHIPPING ORDER AND MUST SIGN THE ORIGINAL BILL OF LADING

BARCO INC. - CHICAGO

326

[fol. 327]

319

05088

E-Z-OUT
REG. U. S. PAT. OFF.

FORM A-19 10M 1-53

Carrier's No.

(NAME OF CARRIER)

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading, at Mason City, Iowa

FROM Northwestern States Portland Cement Co.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination. If on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western, Illinois and Uniform Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

†This shipment is correctly described and weight shown is shipper's, subject to verification by Western Weighing & Inspection Bureau, according to Agreement No. 1708.
†(Shipper's imprint in lieu of stamp; not a part of bill of lading approved by the Interstate Commerce Commission.)

†This is the property of the shipper, and no reconsignment or diversion is to be made unless authorized by the consignor.

Consigned to

Destination

Route

Del. Carrier

Shipping Date

Invoice No.

L. O. No.

Car Initials No.

NO. PACKAGES	Kind of Package, Description of Articles, Special Marks, and Exceptions	* WEIGHT	# RATE	
	Paper Sacks Northwestern Portland Cement Northwestern Portland Cement in Bulk Paper Sacks Northwestern Portland Plastolith Cement Northwestern Portland Plastolith Cement in Bulk Paper Sacks Northwestern High Early Cement Northwestern High Early Cement in Bulk Paper Sacks Northwestern Masons Cement			

(# † Plus 15% increase in freight charges. Plus 3% Gov't tax on all charges.)

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight. NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Northwestern States Portland Cement Co.
Per
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.
Per
(The signature here acknowledges only the amount prepaid.)
Charges advanced: $

Northwestern States Portland Cement Co., Shipper
Per
Permanent post-office address of shipper: MASON CITY, IOWA

Agent
Per

DARCO INC. - CHICAGO

327

322

[fol. 337]

DEFENDANT'S EXHIBIT 13

36828

1

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No._____

_____COMPANY Agent's No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At Mason City, Iowa,_____19____, From Northwestern States Portland Cement Company

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
	Sacks N. S. Portland Cement in Cloth			
	Sacks N. S. Portland Cement in Paper			
	N. S. Portland Cement in Bulk			
	Sacks N. S. High Early Strength Cement			
	Sacks N. S. Masons Cement			

This shipment is correctly described.
Correct weight is_____ lbs.
Subject to verification by the
WESTERN WEIGHING and INSP. BUREAU
According to Agreement No. 1708
Northwestern States Portland Cement Co.
Shipper

Shipper's imprint in lieu of stamp not a part of bill of lading approved by the Interstate Commerce Commission.

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

_____ per_____

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $_____
to apply in prepayment of the charges on the property described hereon.

_____
Agent or Cashier

Per_____
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
Shipper

Per_____
Permanent Postoffice Address of Shipper: MASON CITY, IOWA.

_____ Agent

Per_____

KLIPTE LOOSE LEAF CO., MASON CITY, IA.

337

[fol. 338]

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the Act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharfs, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

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(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

Shipper's No._____

_____ COMPANY

Agent's No._____

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

At Mason City, Iowa, _____ 19____ **From Northwestern States Portland Cement Company**

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only)

Consigned to _____

Destination _____ **State of** _____ **County of** _____

Route _____

Delivering Carrier _____ **Car Initial** _____ **Car No.** _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
	Sacks N. S. Portland Cement in Cloth			
	Sacks N. S. Portland Cement in Paper			
	N. S. Portland Cement in Bulk			
	Sacks N. S. High Early Strength Cement			
	Sacks N. S. Masons Cement			

This shipment is correctly described.
Correct weight is _____ *lbs.*
Subject to verification by the
WESTERN WEIGHING and INSP. BUREAU
According to Agreement No. 1708
Northwestern States Portland Cement Co.
Shipper

Shipper's imprint in lieu of stamp not a part of bill of lading approved by the Interstate Commerce Commission.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $_____
to apply in prepayment of the charges on the property described hereon.

_____
Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per _____

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
Shipper

Per _____
Permanent Postoffice Address of Shipper: MASON CITY, IOWA.

ELIPTC LOOSE LEAF CO., MASON CITY, IA.

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

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[fol. 341]

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(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate covering the property named herein, and is intended solely for filing or record

Shipper's No._____

_____ COMPANY

Agent's No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

At Mason City, Iowa,_____ 19____, From Northwestern States Portland Cement Company

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	Class or Rate	Check Column
	Sacks N. S. Portland Cement in Cloth			
	Sacks N. S. Portland Cement in Paper			
	N. S. Portland Cement in Bulk			
	Sacks N. S. High Early Strength Cement			
	Sacks N. S. Masons Cement			

This shipment is correctly described.
Correct weight is_____ lbs.
Subject to verification by the
WESTERN WEIGHING and INSP. BUREAU
According to Agreement No. 1708
Northwestern States Portland Cement Co.
Shipper

Shipper's imprint in lieu of stamp not a part of bill of lading approved by the Interstate Commerce Commission.

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $_____
to apply in prepayment of the charges on the property described hereon.

_____
Agent or Cashier

Per_____
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per_____

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
Shipper

Per_____
Permanent Postoffice Address of Shipper: MASON CITY, IOWA.

_____ Agent

Per_____

ELIPTC LOOSE LEAF CO., MASON CITY, IA.

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DEFENDANT'S EXHIBIT 14

Form S-7 5M-4-54-S.P.Co.

NORTHWESTERN STATES PORTLAND CEMENT CO.

"NORTHWESTERN BRANDS"

THE RELIABLE CEMENTS

MASON CITY, IOWA

Effective_____we quote you NORTHWESTERN PRODUCTS in carload or mixed carload lots as follows and guarantee these prices against increase during the calendar quarter ending_____.

Any reduction in our prices f. o. b. cars your Station during the calendar quarter becomes effective immediately.

Prices include freight at present rates and will be increased by the amount of any increase in freight rate and/or any Government tax on freight and/or by the amount of any tax on sales or contracts of sale effective on any shipments resulting from this quotation:

	STANDARD OR PLASTOLITH (Air entraining) PORTLAND CEMENTS		MASONS CEMENT
	Bulk	Paper Bags	Paper Bags
F. O. B. Cars our Plant, Mason City, Iowa, Transportation Charges COLLECT.	_____per bbl.	_____per bbl.	_____per bbl.
F. O. B. Cars Your Station Transportion Charges PREPAID	_____per bbl.	_____per bbl.	_____per bbl.

HIGH EARLY STRENGTH CEMENT 50¢ per bbl. more than PORTLAND.

TERMS: On approved credit, net cash 30 days from date of invoice, or 10¢ per barrel discount for cash in 15 days from date of invoice. This quotation is subject to the terms and conditions on both sides hereof, and is not binding until orders have been accepted in writing by this Company

Yours very truly,

NORTHWESTERN STATES PORTLAND CEMENT CO.

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DEFENDANT'S EXHIBIT 15

S-56-10-49-S.P.Co.

Northwestern States Portland Cement Company

Mason City, Iowa

ACCOUNTING DEPARTMENT:

The following claim has been presented by

_____, _____, _____

covering shipment of Car No._____Date_____No. Bbls._____

Order No._____ Invoice No._____ shipped to_____

_____, _____as follows:

The above claim is hereby approved and recommend that the allowance be made

Credit No._____

Date_____

_____

Sales Manager

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DEFENDANT'S EXHIBIT 16

Form S-10 3M-3-54-S.P.Co.

NORTHWESTERN STATES PORTLAND CEMENT CO.

"NORTHWESTERN BRANDS"

THE RELIABLE CEMENTS

MASON CITY, IOWA

Effective _____ we quote you on NORTHWESTERN PRODUCTS in carload or mixed carload lots as follows and guarantee these prices against increase during the calendar quarter ending _____

Any reduction in our prices f. o. b. cars your Station during the calendar quarter becomes effective immediately.

Prices include freight at present rates and will be increased by the amount of any increase in freight rate and/or any Government tax on freight and/or by the amount of any tax on sales or contracts of sale effective on any shipments resulting from this quotation.

F. O. B. Cars, Our Plant, Mason City, Iowa
Transportation Charges, COLLECT

NORTHWESTERN STANDARD OR PLASTOLITH (air-entraining) PORTLAND CEMENTS ..... Bulk _____ per bbl. Paper _____ per bbl.

NORTHWESTERN MASONS CEMENT ..... Paper _____ per bbl.

F. O. B. Cars—Stations Listed Below— Transportation Charges PREPAID	Standard or Plastolith (air-entraining) Portland Cmts. in paper	Masons Cement in paper	F. O. B. Cars—Stations Listed Below— Transportation Charges PREPAID	Standard or Plastolith (air-entraining) Portland Cmts. in paper	Masons Cement in paper

TERMS: On approved credit, net cash 30 days from date of invoice, or 10¢ per barrel discount for cash in fifteen days from date of invoice. This quotation is subject to the terms and conditions on both sides hereof, and is not binding until orders have been accepted in writing by this Company.

Yours very truly,

NORTHWESTERN STATES PORTLAND CEMENT CO.

HIGH EARLY STRENGTH CEMENT 50¢ per bbl. more than above Portland prices.

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[fol. 348]

TERMS AND CONDITIONS

SHIPMENT — Orders entered for fifteen day shipment shall be subject to shipment on the fifteenth day, without notice, unless sooner ordered out by the Purchaser.

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

All orders subject to acceptance in writing by

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
General Office — Mason City, Iowa

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DEFENDANT'S EXHIBIT 17

Form S-9 3M-7-54-S.P.Co.

NORTHWESTERN STATES PORTLAND CEMENT CO.

"NORTHWESTERN BRANDS"

THE RELIABLE CEMENTS

MASON CITY, IOWA

SPECIFIC WORK QUOTATION

We quote you on Northwestern States Cements for the work herein described, subject to conditions on both sides hereof, in carload lots f. o. b. cars

PORTLAND CEMENT	Per barrel in paper including sacks.
PORTLAND CEMENT	Per barrel in bulk.
PLASTOLITH (air-entraining) CEMENT—Same price as Standard Portland Cement.	
HIGH EARLY STRENGTH CEMENT	Per barrel in paper including sacks.
HIGH EARLY STRENGTH CEMENT	Per barrel in bulk.
MASONS CEMENT	Per barrel in paper including sacks.

TERMS: On approved credit net cash 30 days from date of invoice, or 10 cents per barrel discount for cash in 15 days from date of invoice.

WORK:

PRICE GUARANTEE: The above price is guaranteed for the calendar quarter ending After that date our price on Northwestern cements will be our current market price in effect at the time of shipment but not more than 15¢ per barrel above our price in effect on the date this quotation is written.

QUANTITY:

SHIPMENTS: As the work requires. Deliveries to be completed prior to

ACCEPTANCE: This quotation is for your acceptance within

Yours very truly,

NORTHWESTERN STATES PORTLAND CEMENT CO.

E A Hanson

Sales Manager.

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TERMS AND CONDITIONS

CREDIT — If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel any unfilled orders, without notice. Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE — Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS — Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgment on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS — The cement shipped under this quotation shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement, will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

WEIGHT—Price shown for Standard Portland—Plastolith (air-entraining)—High Early Strength Cements is per standard barrel of 376 pounds net. For Masons Cement is per barrel of 280 pounds net.

FREIGHT—Freight charges prepaid by the Seller.

All orders subject to acceptance in writing by

NORTHWESTERN STATES PORTLAND CEMENT COMPANY
General Office — Mason City, Iowa

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DEFENDANT'S EXHIBIT 18

511-3-50-S.P.Co.

Northwestern States Portland Cement Company
MASON CITY, IOWA

Agreement made this _____ day of _____, 19____, between **NORTHWESTERN STATES PORTLAND CEMENT COMPANY,** hereinafter called Seller and _____ hereinafter called Buyer:

Seller hereby sells and agrees to furnish and deliver and Buyer hereby buys and agrees to receive and pay for Northwestern States Portland Cement in the quantity and on the terms and conditions hereinafter set forth.

DESCRIPTION:

QUANTITY: _____

The purpose of this contract is to cover the purchase and sale of _____ the Portland Cement required to complete the work hereinbefore described, whether more or less than the quantity stated herein.

Buyer represents that the aforesaid number of barrels of cement will be used in the construction of the above-described work and agrees that no portion of such cement will be used for any other purpose without the written consent of Seller. If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified; Buyer remaining liable for all unpaid accounts.

DESTINATION: F. O. B. CARS _____

SHIPMENTS: Shipment not to exceed _____ barrels in any one calendar month, except by special agreement.

All shipments to be completed prior to _____

Buyer shall give Seller shipping instructions in writing a reasonable time before shipments are to be made. If Buyer fails to order shipment within the time specified Seller shall have the right to extend the time for delivery of such cement, but shall not be obligated to do so, except at its option.

PRICE: Per standard barrel of 376 pounds net, in paper bags in carload lots f. o. b. above destination _____ $_____

Per standard barrel of 376 pounds net, in bulk in carload lots f. o. b. above destination _____ $_____

All shipments made on this contract will be at the current destination price of Seller on the date of shipment, if this price is below the contract destination price mentioned herein.

TERMS OF PAYMENT: On approved credit net cash 30 days from date of invoice, or 10 cents per barrel discount for cash in 15 days from date of invoice.

If at any time the financial responsibility of Buyer becomes impaired or unsatisfactory to Seller, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If Buyer fails to comply with terms of payment, or with any of the other terms of sale, Seller reserves the right to cancel unfilled portion of this contract, without notice, Buyer remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by Seller to exercise the same.

PACKAGE: Price on cement packed in paper bags includes the paper bags which are not returnable.

Shipments of bulk cement shall be invoiced and collected for on a basis of track scale weights nearest to point of origin.

CLAIMS: Claims for loss or damage will not be considered unless supported by seal record and railroad agent's acknowledgement on original destination freight bill. Freight overcharge claims must be accompanied by original receipted freight bill.

Seller reserves the right to select the route and method by which shipments shall be forwarded.

SPECIFICATIONS: The cement shipped under this contract shall conform to the present standard specifications for Portland Cement of the American Society for Testing Materials. No other Warranty is made in respect thereof. Seller having no control over the use of cement will not, therefore, guarantee finished work in which it is used, nor shall the Seller be responsible for the condition of cement after delivery to Buyer. Any charges incident to inspection or tests made by or on behalf of Buyer to determine compliance with specifications shall be paid by Buyer.

Seller shall not be liable to Buyer for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal or other material, governmental interference or regulation, delays in transportation, or contingencies beyond Seller's control; and during the time of such delays Seller shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship.

If the Seller is prevented from delivering cement within the time agreed upon, by any of the above mentioned causes, it shall not be required to make shipment after final date of delivery, unless it so elects.

This contract is not assignable by Buyer without the consent of Seller in writing.

_____
(Buyer's Signature)

By _____

No. _____

NORTHWESTERN STATES PORTLAND CEMENT CO.,

By _____
Sales Manager

351

[fol. 352]

DEFENDANT'S EXHIBIT 19

S26-2M-1-45-S.P.CO.

Ter.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY

CONTRACT RECORD

Contract No.

Invoice to

Address

Customer's No.

Date

Ship to

Destination

Route Via

Special Instructions

Expiration

PORTLAND HIGH EARLY MASONS

Barrels

Price 36826

Net

Rate

To be tested by

Description of work

35r

[fols. 354, 355]

S26-2M-1-45-S.P.CO.

Ter.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY

CONTRACT RECORD

Contract No.

Invoice to

Customer's No.

Address

Date

Ship to

Expiration

Destination

	PORTLAND	HIGH EARLY	MASONS
Barrels			
Price			
Net			
Rate			

Route Via

Special Instructions

To be tested by

Description of work

354

SHIPPING INSTRUCTIONS							BARRELS SHIPPED									CAR NUMBER	ROUTING
DATE	LOAD ORDER NUMBER	DATE TO LOAD		BARRELS			DATE	PORTLAND			HIGH EARLY			MASONS			
				PORTLAND	HIGH EARLY	MASONS		TODAY	TOTAL	PRICE	TODAY	TOTAL	PRICE	TODAY	TOTAL	PRICE	

(355)

DEFENDANT'S EXHIBIT 20

S-11-A-5-50-S P.Co.

Portland Cement Contract in Triplicate

herein called Seller, agrees to furnish and deliver and

herein called the Purchaser, purchases and agrees to receive and pay for Northwestern States Portland Cement in the quantity and on the terms and conditions hereinafter specified:

QUANTITY: All the Portland cement required in construction of

but not to exceed estimated quantity of ( ) barrels.

USE: Purchaser expressly agrees that all cement delivered by Seller under this contract will be used exclusively in above mentioned contract work and agrees to furnish Seller upon request evidence satisfactory to Seller of use of cement delivered under this contract. In the event cement delivered under this contract is diverted by Purchaser to other uses, Purchaser agrees to pay Seller for such cement at Seller's current retail price at time such diversion was made and Seller reserves the right to cancel, without notice, unfilled portion of this contract, Purchaser remaining liable for all unpaid items shipped prior to cancellation.

PRICE: Including package dollars and cents ($)
per standard barrel of 376 pounds net, in carload lots F. O. B. Cars

PRICE: Including package dollars and cents ($)
per standard barrel of 376 pounds net, F. O. B. Seller's warehouse at

SHIPMENTS: Shipments not to exceed barrels in any one calendar month, except by special agreement. All shipments to be completed prior to 19
The Purchaser shall give the Seller shipping instructions a reasonable time before shipments are to be made, and the Seller shall not be responsible for delays in manufacturing or shipping caused by strikes, differences with employes, accidents, fires, floods, failure of transportation lines to furnish cars, delays in transportation, or other contingencies not under its control.

If the Seller is prevented from delivering cement within the time agreed upon, by any of the above mentioned causes, it shall not be required to make shipment after final date of delivery, unless it so elects.

If Purchaser fails to take cement within the time agreed upon, the Seller reserves the right to extend time for delivery, but shall not be obliged to do so.

TERMS OF PAYMENT:

Sacks to be paid for at same time as cement.

If credit of Purchaser is not satisfactory, or if at any time the financial responsibility of Purchaser becomes impaired, or the account becomes unsatisfactory to the Seller, it reserves the right to require payments in advance and pending same, may withhold shipment.

If Purchaser fails to comply with terms of payment or with any of the other conditions of sale, the Seller reserves the right to cancel, without notice, unfilled portion of any contract or orders, the Purchaser remaining liable for all unpaid items shipped prior to the cancellation.

PACKAGES: Prices on cement packed in paper bags includes the paper bags which are not returnable.

SPECIFICATIONS: The cement is to conform to Standard Specifications for Portland Cement adopted by the American Society for Testing Materials. Any claim that cement does not conform to Standard Specifications must be made immediately upon the receipt of the shipment and before any of the cement has been used. The use of the cement shipped hereunder shall constitute an acceptance thereof to the extent of such use, and such cement so used shall be conclusively deemed to conform to Standard Specifications. The Seller makes no warranty other than stated herein. Any charges incident to inspection or tests made by or on behalf of Purchaser to determine compliance with specifications shall be paid by Purchaser.

The Seller cannot be held for loss or damage while cement is in transit or storage. Should loss or damage occur while cement is in transit the Seller will make claim against the transportation company for account of Purchaser upon presentation by Purchaser of freight bill bearing railroad agent's notation of such loss and damage and such other evidence as is necessary to substantiate claim.

ASSIGNMENT OF CONTRACT: This contract shall not be assigned by the Purchaser, except upon written assent thereto by the Seller.

OTHER CONDITIONS:

Executed by the parties hereto this day of 19 at

(Purchaser's Signature)

By

No.

(Seller's Signature)

By

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[fol. 357]

DEFENDANT'S EXHIBIT 26

539-3M-1-43-S.P.Co.

Northwestern States Portland Cement Company

MASON CITY, IOWA

ADVERTISING REQUISITION

Date _____

Town _____

Salesman _____

Please furnish (Firm) _____

at _____

Following Advertising: Check if Old Customer ☐ New Customer ☐ Prospect ☐

✓	QUANTITY	DESCRIPTION
		* DEALERS LETTERHEADS
		No. 1 Farm
		No. 2 Home
		* CONTRACTOR LETTERHEADS
		No. 3 House
		No. 4 Bridge Contractor's
		Envelopes (small)
		Envelopes (large)
		FOLDERS
		Concrete
		Septic Tanks
		Sidewalks
		Troughs and Tanks
		Concrete Floors
		10 Sax Northwestern
		Feeding Floors
		F132-A Concrete Floors in Farm Buildings
		F132-B Concrete Feeding Floors
		F132-C Concrete Laying House
		F132-D A Small Farrowing House
		F132-E How to Build out Rats
		F132-F Concrete Footings and Foundation Walls
		F132-G Concrete Masonry Farm Buildings
		F132-H A Concrete Milk-Cooling Tank
		F132-J Concrete Dairy Barn Floors
		F132-K One Room Concrete Milk House
		F132-L Low Cost Farm Structures
		F132-M Tanks and Troughs
		F132-N Farm Concrete in Cold Weather

✓	QUANTITY	DESCRIPTION
		MISCELLANEOUS
		Blotters
		Memo Pads
		Time Books
		Pencils (No. 2—soft)
		Pencils (No. 3—hard)
		Paper Weights
		Warehouse Signs
		Truck Signs
		Matches
		Masons Material—Estimator
		BOOKLETS
		F18 Plans for Concrete Farm Buildings
		F10 Concrete Handbook of Permanent Farm Construction
		Masons Cement
		How to Mix Masons Cement
		Estimating Table (Book)
		Estimating Table (Card)

*ATTACH COPY OF CUSTOMER'S LETTERHEAD

LEAVE COPY OF ORDER WITH CUSTOMER

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[fol. 358]

DEFENDANT'S EXHIBIT 28

Form S18-5M-6-49 S.P.Co.

36828

Northwestern States Portland Cement Co.

General Letter

FROM
SALES DEPARTMENT
MASON CITY, IOWA

December 18, 1950

DEAR SIR:

We have new quotations in the mail to the trade today effective January 1, 1951 on the following basis.

Standard Portland and Plastolith cement $2.60 per barrel in bulk f.o.b. our mill.

Standard Portland and Plastolith cement $2.90 per barrel including paper bags f.o.b. our mill.

High Early Strength cement 50¢ per barrel higher than above price.

Masons Cement $2.75 per barrel including paper bags f.o.b. our mill.

Please acknowledge receipt.

Yours truly,

G. B. Pray
SALES MANAGER

DG:DA

[fol. 359]

PLAINTIFF'S EXHIBIT Q

February 8, 1950

Northwestern States Portland Cement Company
Mason City
Iowa

Gentlemen:

We have written you at various times requesting that either file State corporation income tax returns for the years ending November 30, 1933 through November 30, 1948. However, we have not received such returns.

Under authority of Section 290.47 of the Income Tax Act, we have prepared returns for you from such information as we could obtain and have assessed a tax on the basis thereof for each year. This section also provides that any return made by us because of your failure to file a return shall be prima facie correct and valid and you shall have the burden of establishing its incorrectness or invalidity in any action or proceeding in respect thereto.

We are enclosing statements of account showing the amount of tax, penalty and interest assessed for each year. Kindly send remittance for the full account shown on these statements within ten days from the date of this letter, or the accounts will be given to the Attorney General with instructions to bring immediate suit against you for the recovery of these liabilities.

Very truly yours,

G. HOWARD SPAETH
Commissioner of Taxation

By
Wm. C. Barkman, Director
Income Tax Division

PSJ:ds
Enc.
Reg.

359

[fol. 360]

Plaintiff's Exhibit R

36[illegible]

1

R

October 21, 1949

Northwestern States Portland Cement Company
First National Bank Building
Mason City, Iowa

In re: 1943 to 1948, Inclusive

Gentlemen:

Section 33 of the Minnesota Income and Franchise Tax Act requires every corporation to file a Minnesota State income and franchise tax return if its taxable income was in excess of $1,000 or if its gross income was in excess of $5,000. Therefore, even if net income was less than $1,000, a return still must be filed if gross income was in excess of $5,000.

According to our records you have not filed Minnesota State income and franchise tax returns for the years shown above. DEMAND is hereby made upon you under Section 44 of the Act to file returns for the periods shown above within thirty days from the date of this letter and to pay the full amount of tax shown to be due on each return together with the penalty and interest imposed by the Act.

Corporations whose gross income was less than $5,000 or whose taxable net income was less than $1,000 are required to execute and file the enclosed affidavits.

A corporation engaged in the business of mining or producing iron ore, claiming exemption under Section 5 (b) of the Act, must file a complete return and in addition thereto an affidavit on Form 120 (b) relative to that part of the income claimed as exempt because of its being derived exclusively from mining or producing iron ore.

Each corporation claiming exemption under Section 5 must file an application for exemption on proper forms to be obtained from this Division. A return must be filed until this claim for exemption has been approved.

If you fail to file the returns or the affidavits within thirty days from the date of this demand, returns will be prepared for you for these periods by the Commissioner of Taxation from the best available information and an assessment of tax will be made on the basis thereof together with the penalties provided by Section 49 of the Act.

Very truly yours,

G. HOWARD SPAETH
Commissioner of Taxation

By
Wm. G. Burkman, Director
Income Tax Division

PJB:ss
[redacted]
Encl. Sent under separate cover.
516 (a)
[redacted] mail.

360

[fol. 361]

PLAINTIFF'S EXHIBIT S

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated January 31, 1952 in the name of Northwestern State Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1952 Chieftan Deluxe 4door with serial number P8WS3082, 1952 registration number 961532.

Dealer's Report of Sale on reverse side of application covering same vehicle, executed to show sale from Lake Street Pontiac, Inc., Minneapolis, Minnesota, to Northwestern States Portland Cement Company under date of January 31, 1952.

Application for Registration dated October 15, 1952 in the name of Northwestern States Portland Cement Company, covering same vehicle, 1953 registration number 85087.

36828

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this 29th *day of* October, *A. D. 19* 54.

Mrs. Mike Holm
Secretary of State

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[fol. 362]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

9613532

Do Not Write in This Space

RECD 1
31

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Henn } ss. Date 1-31, 1952

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1951 Minnesota Registration No.

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00
801-2000	15.20	15.00	12.50	10.00	7.50
2001-2200	16.80	15.00	12.50	10.00	7.50
2201-2400	18.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.60	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
3401-3600	828.00	$21.00	$14.00	$10.00	$ 7.50
3601-3800	33.30	24.98	16.65	10.00	8.33
3801-4000	39.00	29.25	19.50	10.00	9.75
4001-4200	45.10	33.83	22.55	11.28	11.28
4201-4400	51.60	38.70	25.80	12.90	12.90
4401-4600	58.50	43.88	29.25	14.63	14.63
4601-4800	65.80	49.35	32.90	16.45	16.45
4801-5000	73.50	55.13	36.75	18.38	18.38
Over 5000	75.00	56.25	37.50	18.75	18.75

3. "PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. "MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. "SNOWMOBILE": CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Pontiac
8. SERIAL NO. P8K5 3052
9. YEAR & MODEL 1952 - 24
10. TYPE Chieftain Dely 4Dr
11. Check kind of transmission: Standard ☑ Other ☐
12. No. of Cyl. 8 Pass. Cap. 5

Weight 3378 3377 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS { Tax ____ Fees ____
1952 Tax 26.40
1952 Fees ____
Total ____

Attach Registration Certificate Here. If not attached, explain why.

Please do not send personal check

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co (Owner must sign here) Northwestern States Portland Cement Co (Print or type name here)
14. I RESIDE IN THE COUNTY OF Henn
15. I GET MY MAIL AT 1018 - Roanoke Bldg. (Postoffice Address (Street or R.F.D.)) Minneapolis (City) Minn (P.O. Zone) (State)

CERTIFICATE will be sent to this address, be sure it is clear.

SEAL.

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this 31 day of January, 195 2

Notary Public Hennepin County, Minn. My commission expires

JOHN TRITCHLER
Notary Public, Hennepin County, Minn
My Commission Expires Dec. 8, 1958.

If plates are not to be sent to owner as above give name and address here ____

(Postoffice Address (Street or R.F.D.)) (City) (P.O. Zone) (State)

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 363]

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 12 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send **SEPARATE CHECKS** for **EACH APPLICATION** to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only.

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ (Date) 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____ (Date)

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased Lake St. Pontiac Inc

Mpls (City) Minn (State) 23. Date purchased 1-31, 1952

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of Henn } ss.

_____ being duly sworn says: That he is authorized to sign as agent for Lake St Pontiac Inc, licensed as dealer for 52 (Year) under No. 0969; that said licensed dealer on 1-31-52 (Date) sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from Pontiac Div. Gen'l Motors (Whom) Pontiac Mich (Address) on 1-9-52 (When) by Truck-Boat-Truck - Clark Transport (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.); that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature _____

Subscribed and sworn to before me this 31 day of January, 1952

_____ SEAL

Notary Public _____ County, Minn. My commission expires _____

Notary Public, Hennepin County, Minn.
My Commission Expires Dec. 8, 19[illegible]

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Form AA

DO NOT SEND PERSONAL CHECK

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Attach Draft, Cashier's or Money Order.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

Answer all questions on this side pertinent to the registration of your vehicle and, if the vehicle is a new one, a used one from another state or a home made one not previously registered, answer the questions pertinent thereto on the reverse side hereof.

STATE OF MINNESOTA } ss.
County of Hennepin

To the Registrar of Motor Vehicles
St. Paul, Minnesota
Date 10-15 1952

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein, which is hereby listed for registration and taxation under the laws of the State of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

REC'D
OCT 15
1952

Give 1952 Minnesota

Registration No. 461752

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

Attach Registration Certificate Here. If not attached, explain why.

CHECK CLASS IN WHICH YOU WISH TO REGISTER

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE" CLASS:** "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons. Tax: Find it by weight, table below (Item 6). ____

2. **"HOUSE TRAILER" CLASS:** "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called. Tax: Find it by weight, table below (Item 6). "HZ" ____

3. **"PASSENGER CAR UTILITY TRAILER" CLASS:** Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire. **Have you read the law above and do you certify that your trailer meets all the conditions prescribed therein?** ____ **(Must be answered).** Tax: $2 per biennium, $1 for last year thereof (1953). "SZ" ____

4. **"MOTORCYCLE" CLASS:** Does it have a side car or three wheels? ____ Tax: Without side car $3, with side car or 3 wheels, $5. "MC" ____

5. **"MOTOR SCOOTER", "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR" CLASS:** Encircle the one you are registering. Tax: $1. "MBS" ____

7. MAKE Pont

8. SERIAL NO. 1 8 K S 3 1 5 2

9. YEAR & MODEL 5 2 Chief Dlx

10. TYPE 44

11. Check kind of transmission:
Standard ☐ Standard with overdrive ☐ Other ☐
"Other" includes Automatic, Dynaflow, Ford-o-matic, Gyromatic, Hydra-matic, Merc-o-matic, Powerglide, Prestomatic, Tip-toe Hydraulic, and Ultramatic.

12. No. of Cyl. ____ Pass. Cap. ____

Weight 3378 lbs.

If passenger automobile, ambulance, hearse, house trailer, or station wagon, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.)

(DO NOT WRITE IN THIS SPACE)

Arrears { Tax ____ Fees ____

1953 Tax 2.60 FC

1953 Fees ____

Total ____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. X [signature] (Owner must sign on above line opposite X)

Northwestern State Bank
(Print or type name here)

14. Hennepin (County of residence)

15. 1010 Ranchette Bldg
Postoffice Address (Street or R.F.D.)

Minneapolis Minn
(City) (P.O. Zone) (State)

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ day of ____, 195

SEAL

Notary Public ____ County, Minn.

My commission expires ____

6. PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$5.00	3401-3600	$28.80	$21.60	$14.40	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.80	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

If plates are not to be sent to owner as in item 15 give name and address below

Name ____

Postoffice Address (Street or R.F.D.) ____

City and State ____

344

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fols. 365, 365a]

PLAINTIFF'S EXHIBIT T

United States of America.

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated April 24, 1951 in the name of Lake Street Pontiac, Inc., 720 East Lake Street, Minneapolis, Minnesota, covering a 1951 Pontiac Chieftan Deluxe 4door Sedan with serial number P8UH50547, 1951 registration number 938872.

Dealer's Report of Sale on reverse side of application covering same vehicle, executed to show sale from Lake Street Pontiac, Inc., Minneapolis, Minnesota to Lake Street Pontiac, Inc. under date of April 24, 1951. Also showing posting of transfer to Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota under date of May 25, 1951, Transfer No. B 71697.

Bill of Sale covering same vehicle executed to show transfer of ownership from Lake Street Pontiac, Inc. to Northwestern States Portland Cement Company under date of May 25, 1951.

Application for Transfer on lower half of bill of sale form covering same vehicle, executed by Wm. R. Wilkins for Northwestern States Portland Cement Company with date of acknowledgment May 25, 1951.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this

29th *day of* October,

A. D. 19 54.

Secretary of State

365

Application for Registration dated October 5, 1951 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1951 Pontiac Chieftan Deluxe 4door with serial number P8UH50547, 1952 registration number 30467.

Application for Registration dated October 15, 1952 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1953 registration number 85086.

365a

Here Attach Draft, Cashier's Check or Money Order.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Do Not Write in This Space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Hennepin } ss. Date April 24, 1951

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No. New

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS ____
"Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
Encircle above the one you are registering. Tax table below.

2. "HOUSE TRAILER": CLASS "HZ" ____
"House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3601-3800	$33.30	$24.98	$16.65	$10.00	$ 8.33
2000-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.00	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

3. "PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____
Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
Tax: $2 per biennium, $1 for last year thereof (1951).

4. "MOTORCYCLE": CLASS "MC" ____
Does it have a side car or three wheels? ____
Tax: Without side car $3, with side car or 3 wheels $5.

5. "MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS" ____
Encircle the one you are registering. Tax: $1.

6. "SNOWMOBILE": CLASS "S" ____
Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Pontiac

8. SERIAL NO. P8UH 50547

9. YEAR & MODEL '51 Chftn.

10. TYPE Dlx. 4Dr. Sed.

11. Check kind of transmission: Standard ☐ Other ☒

12. No. of Cyl. 8 Pass. Cap. ____

Weight 3488 lbs.
If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS Tax ____ Fees ____
1951 Tax 21.00
1951 Fees ____
Total ____

Attach Registration Certificate Here. If not attached, explain why.

Please do not ... personal check
(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X LAKE STREET PONTIAC INC. Manager (LAKE STREET PONTIAC INC. O. L. Olson, Manager)
Owner must sign here (Print or type name here)

14. I RESIDE IN THE COUNTY OF Hennepin

15. I GET MY MAIL AT 720 East Lake Street Minneapolis 7 Minnesota
Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this 24th day of April, 195 2

LEONARD E. KIMBALL
Notary Public Hennepin County, Minn. My Commission Expires Nov. 11, 1953

Notary Public Hennepin County, Minn. My commission expires 11 11 53

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 367]

231572 **Please do not send personal check**

Northwestern States Portland Cement Co
1010 Roanoke Bldg Mpls. 3 Minn.

938872
5-25-51

ink. Remit by certified check, American Express or U. S. Postal money order, or bank
s with which personal checks are submitted will be held up for 12 days after deposit
le not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return
warded in the same envelope, it is well to put the old registration number or applicant's
with the right application.

Do Not Write in This Space. For Office Use Only.

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____ (Date)

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased LAKE STREET PONTIAC INC.

Minneapolis, Minnesota 23. Date purchased April 24, 195 1
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of Hennepin } ss

O. L. Olson being duly sworn says: That he is authorized to sign as agent for LAKE STREET PONTIAC INC., licensed as dealer for 1951 (Year) under No. D 365; that said licensed dealer on _____ (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from Pontiac Motor Division (Whom) Pontiac, Michigan (Address)

April 2, 1951 (When) by Truck, Boat, Truck-- Clark Transport Co. (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used)

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature O. L. Olson

Subscribed and sworn to before me this 30th day of April, 195 1

Notary Public Hennepin County, Minn. My commission expires 11 11 52

SEAL

8

ol. 368]

BILL OF SALE. Sold by R. E. Anderson, 460 Rice Street, St. Paul, Minn. Phone: Garfield 3444 Form No. 26

BILL OF SALE

1697

Any erasure or alteration will void this bill of sale.

STATE OF MINNESOTA,

County of Hennepin

IMPORTANT

REGISTRATION NO.
938-872

For One Dollar, _____ and other considerations,

I Lake Street Pontiac, Inc. of 720 East Lake St. Minneapolis Grantor

on the 25th day of May 1951, sold, assigned the tax paid to, and gave possession of,

Make	Serial No.	Motor No.	Year	Type
Pontiac	P8UH 50547	P8UH 50547	1951	Chftn. Dlx. 4Dr.

to Northwestern States Portland Cement Co. (Name of Purchaser) of 1010 Roanoke Bldg. Minneapolis (Address of Purchaser) Grantee

clear of all liens and encumbrances except None

Give reason why you are using this blank instead of a registration card to make the transfer.

CHECK ANSWER BELOW.

I did not receive the card _____ It has been lost _____

It has been destroyed _____ It has been turned in with application for re-registration _____

It has been sent in to make a transfer _____

Subscribed and sworn to before me this

25th day of May 1951

Leonard W. Kimball

Notary Public Hennepin County.

My commission expires 11-14-53

Lake Street Pontiac, Inc.

Signature of Seller

By O. R. Anderson

APPLICATION FOR TRANSFER

STATE OF MINNESOTA,

County of Hennepin

M. V. DEPT. MAY 29 1951 RECEIVED

On the 25th day of May 1951, I bought the above described motor vehicle from Lake Street Pontiac, Inc. (Name of Seller) of 720 East Lake St. Minneapolis (Address of Seller) have viewed it carefully and know that it is correctly described and now ask that the registration be transferred to me.

Subscribed and sworn to before me this

25th day of May 1951

Leonard W. Kimball

Notary Public Hennepin County.

My commission expires 11-14-53

Northwestern States Portland Cement Co.

Signature of Purchaser

By Sam R. Dilkis

Address 1010 Roanoke Bldg.

If this truck will be used only in Class T, mark a cross _____

If this truck will be used in Class X, designate your zone of operation _____

If you desire to register this truck in Class Y, give gross weight _____

[fol. 369]

Form AA

Here Attach Draft, Cashier's Check or Money Order.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

304667

Do Not Write in This Space

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

REC'D OCT 5 1951

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Ramsey } ss. Date Oct 5, 1951

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1951 Minnesota Registration No. 435-812

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

3. "PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. "MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. "SNOWMOBILE": CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Ford
8. SERIAL NO. 8U4-5054
9. YEAR & MODEL 1951-Ch
10. TYPE Pick up
11. Check kind of transmission: Standard ☐ Other ☐
12. No. of Cyl. ____ Pass. Cap. ____

Weight 3402 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS { Tax ____ Fees ____
1952 Tax ____
1952 Fees ____
Total ____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at State Capitol.

13. OWNER X [signature] [illegible]
    Owner must sign here (Print or type name here)
14. I RESIDE IN THE COUNTY OF [illegible]
15. I GET MY MAIL AT [illegible]
    Postoffice Address (Street or R.F.D.) City P.O. Zone State
    CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ day of ____, 195__

Notary Public ____ County, Minn. My commission expires ____

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Attach Registration Certificate Here. If not attached, explain why.

Please do not [illegible] personal check

(SEE INSTRUCTIONS REVERSE SIDE HEREOF)

Form AA

DO NOT SEND PERSONAL CHECK

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

How—Attach Draft, Cashier's or Money Order.

When Registration Certificate Here. If not attached, Mail Registration this way.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

Answer all questions on this side pertinent to the registration of your vehicle and, if the vehicle is a new one, a used one from another state or a home made one not previously registered, answer the questions pertinent thereto on the reverse side hereof.

STATE OF MINNESOTA } ss.
County of Hennepin

To the Registrar of Motor Vehicles
St. Paul, Minnesota
Date 10-15 1952

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is hereby listed for registration and taxation under the laws of the State of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE" CLASS: ✓
"Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
Tax: Find it by weight, table below (Item 6).

2. "HOUSE TRAILER" CLASS: "HZ"_____
"House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
Tax: Find it by weight, table below (Item 6).

3. "PASSENGER CAR UTILITY TRAILER" CLASS: "$Z"_____
Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
Have you read the law above and do you certify that your trailer meets all the conditions prescribed therein?_____.
(Must be answered).
Tax: $2 per biennium, $1 for last year thereof (1953).

4. "MOTORCYCLE" CLASS: "MC"_____
Does it have a side car or three wheels?_____
Tax: Without side car $3, with side car or 3 wheels, $5.

5. "MOTOR SCOOTER", "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR" CLASS: "MBS"_____
Encircle the one you are registering. Tax: $1.

(DO NOT WRITE IN THIS SPACE)

6 PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$5.00	3401-3600	$30.00	$21.00	$14.00	$16.00	$ 7.00
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.50	24.00	16.00	10.00	8.35
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.00	18.00	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	34.00	22.00	11.25	11.25
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.00	12.00	12.00
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.00	29.25	14.00	14.00
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.50	49.25	32.00	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	78.00	58.25	37.50	18.75	18.75

If plates are not to be sent to owner as in item 15 give name and address below

Name_____

Postoffice Address (Street or R.F.D.)_____

City and State_____

Do Not Write in This Space

REC'D OCT 15 1952

Give 1952 Minnesota Registration No. 30467

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

7. MAKE Pont
8. SERIAL NO. P8VH50547
9. YEAR & MODEL 51 Ch Six
10. TYPE 4d
11. Check kind of transmission:
Standard ☐ Standard with overdrive ☐ Other ☐
"Other" includes Automatic, Dynaflow, Ford-o-matic, Cyromatic, Hydra-matic, Merc-o-matic, Powerglide, Prestomatic, Tip-toe Hydraulic, and Ultramatic.
12. No. of Cyl._____ Pass. Cap._____

Weight 3488 lbs.
If passenger automobile, ambulance, hearse, house trailer, or station wagon, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.)

Arrears { Tax_____ Fees_____
1953 Tax 2.00
1953 Fees_____
Total_____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. X Co by Wm P Wilkerson - Dealer
(Owner must sign on above line opposite X)

Northwestern Motor Co Portland Cement Co
(Print or type name here)

14. Hennepin
(County of residence)

15. 1010 Roanoke Bldg
Postoffice Address (Street or R.F.D.)
Minneapolis 2 Minn
(City) (P.O. Zone) (State)

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this_____ day of_____, 195_

SEAL

Notary Public_____ County, Minn.
My commission expires 11 7 56

376

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 371]

PLAINTIFF'S EXHIBIT U

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated February 25, 1952 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1952 Chevrolet, Model 2103, Styline Deluxe 4door with serial number 21KKA6703, 1952 registration number 963878.

Dealer's Report of Sale on reverse side of application covering same vehicle, executed to show sale from Grossman Chevrolet Company, Inc., Minneapolis, Minnesota to Northwestern States Portland Cement Company under date of February 25, 1952.

Application for Registration dated October 15, 1952 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1953 registration number 85088.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this

29th *day of* October,

A. D. 19 54.

Mrs. Mike Holm

Secretary of State

371

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

Do Not Write in This Space

FEB 25 1952

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Henn } ss. Date 2/25/52, 195__

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE":** CLASS Y
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR":** CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE":** CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

Give 1951 Minnesota Registration No. ____

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

7. MAKE Chev.
8. SERIAL NO. 21KKA6703
9. YEAR & MODEL 1952-2103
10. TYPE Sty 4d Dlx
11. Check kind of transmission: Standard ☐ Other ☒
12. No. of Cyl. 6 Pass. Cap. 6

Weight 3[illegible] 3150 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS	Tax	
	Fees	
1952 Tax		24.20
1952 Fees		
Total		24.20

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co
    Owner must sign here By Wm. E. Wilkins Dist Mgr. (Northwestern States Portland Cement Co
    (Print or type name here)
14. I RESIDE IN THE COUNTY OF Henn
15. I GET MY MAIL AT 1010 Roanoke Bldg. Mpls Minn
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

84 SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this 25 day of Feb, 1952

E. H. Pitzer
Notary Public, Hennepin County, Minn.
Commission Expires Jan. 14, 1955

Notary Public ____ My commission expires ____

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

Please do not use personal check

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

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NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 373]

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 12 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased Grossman Chevrolet Co. Inc

Mpls (City) – Minn (State) 23. Date purchased 2/25/52, 195__

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of Henn } ss.

J.P. Bechtle being duly sworn says: That he is authorized to sign as agent for Grossman Chev. Co. Inc, licensed as dealer for 1952 (Year) under No. 325;

that said licensed dealer on 2/25/52 (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from Chevrolet Motor Division (Whom) Janesville, Wisconsin (Address)

2/6/52 (When) by W.R. Arthur (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.);

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature J P Bechtle

Subscribed and sworn to before me this 25th day of Feb, 195 2

SEAL

Notary Public _____ County, Minn. My commission expires _____

373

Form AA

DO NOT SEND PERSONAL CHECK

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Here Attach Draft, Cashier's or Money Order.

Attach Registration Certificate Here. If not attached, explain why.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

Answer all questions on this side pertinent to the registration of your vehicle and, if the vehicle is a new one, a used one from another state or a home made one not previously registered, answer the questions pertinent thereto on the reverse side hereof.

STATE OF MINNESOTA } ss.
County of Hennepin

To the Registrar of Motor Vehicles
St. Paul, Minnesota
Date Oct 15 1952

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is hereby listed for registration and taxation under the laws of the State of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE" CLASS:** "P" X
"Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
Tax: Find it by weight, table below (Item 6).

2. **"HOUSE TRAILER" CLASS:** "HZ" ____
"House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
Tax: Find it by weight, table below (Item 6).

3. **"PASSENGER CAR UTILITY TRAILER" CLASS:** "SZ" ____
Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
Have you read the law above and do you certify that your trailer meets all the conditions prescribed therein? ____
(Must be answered).
Tax: $2 per biennium, $1 for last year thereof (1953).

4. **"MOTORCYCLE" CLASS:** "MC" ____
Does it have a side car or three wheels? ____
Tax: Without side car $3, with side car or 3 wheels, $5.

5. **"MOTOR SCOOTER", "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR" CLASS:** "MBS" ____
Encircle the one you are registering. Tax: $1.

(DO NOT WRITE IN THIS SPACE)

6. PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$5.00	1401-1600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.00	15.00	12.50	10.00	7.50	1601-1800	33.10	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	1801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.30	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	74.50	56.13	36.75	18.38	18.38
3201 & up	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	80.25	37.50	18.75	18.75

If plates are not to be sent to owner as in item 15 give name and address below

Name

Address Street or R F D

City and State

Do Not Write in This Space

REC'D OCT 15 1952 1

Give 1952 Minnesota

Registration No. 963878

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

7. MAKE Chev
8. SERIAL NO. 2KKAL703
9. YEAR & MODEL 52 2103 S/D
10. TYPE 4d
11. Check kind of transmission:
Standard ☐ Standard with overdrive ☐ Other ☐
"Other" includes Automatic, Dynaflow, Ford-o-matic, Gyromatic, Hydra-matic, Merc-o-matic, Powerglide, Prestomatic, Tip-toe Hydraulic, and Ultramatic.
12. No. of Cyl. ____ Pass. Cap. ____

Weight 3265 lbs.

If passenger automobile, ambulance, hearse, house trailer, or station wagon, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.)

JW

Arrears { Tax ____ Fees ____

1953 Tax 2646

1953 Fees ____

Total ____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. X [signature] Northwestern Photo Prod. Co.
(Owner must sign on above line opposite X)
(Print or type name here)

14. Hennepin
(County of residence)

15. 1010 Roanoke Bldg
Postoffice Address (Street or R.F.D.)
Minneapolis Minn.
(City) (P.O. Zone) (State)

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant

Subscribed and sworn to before me this ____ day of ____, 195

SEAL

Notary Public ____ County, Minn.

My commission expires 11-7-52

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

[fols. 375, 375a]

PLAINTIFF'S EXHIBIT V

Certified Copies of Documents.

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated October 14, 1948 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1946 Pontiac, Model P6LA, 4door with motor and serial number P6LA6428, 1949 registration number 86067.

Application for Registration dated October 6, 1949 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1950 registration number 30696.

Application for Registration dated October 6, 1950 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1951 registration number 31577.

Application for Registration dated October 5, 1951 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1952 registration number 30468.

Posting of Transfers on reverse side of application covering same vehicle, to Lake Street Pontiac, Inc., 720 E. Lake St.,

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this 29th *day of* October, *A. D. 19* 54.

Wm. V. Holm

Secretary of State

375

Minneapolis, Minnesota under date of February 2, 1952, Transfer No. 90033; and to Gayle O. Testin, 3432 Third Avenue South, Minneapolis, Minnesota under date of April 18, 1952, Transfer No. 165715.

375a

FORM 1H

APPLICATION FOR MOTOR VEHICLE REGISTRATION

USE THIS SIDE ONLY TO RE-REGISTER A VEHICLE REGISTERED IN MINNESOTA LAST YEAR

For new vehicle or one registered elsewhere use other side

AUTOMOBILE—HEARSE—SCHOOL BUS (Cross out two)

To MIKE HOLM, Secretary of State

St. Paul, Minnesota

Date Oct 14 1948

RECD OCT 14 1948

Do not write in this space.

B 850657

Banker's Check or Money Order

Here Attach

Do not Write in This Space. For Office Use Only.

Attach Registration Certificate Here. If not attached, explain why.

Give 1948 Minnesota Registration No.

No. 31751

Make Pont

Motor P62L 6428

Serial P62A 6428

Year & Model 1946- P62A

Type 4 Dr.

SHIPPING WEIGHT
(As shown on registration card)
3335 lbs.

If shipping weight is not available attach official weight ticket.

No. of Cylinders ___ Capacity ___ passengers.

IF VEHICLE IS A BUS is it operated ONLY as a School Bus ___?

(If not, this blank will not serve. Use [illegible] Form 5A)

Manufacturer's Shipping Weight	TAX IN ALL MAKES							
	All 1949 Models	All 1948 Models	All 1947 Models	All 1946 Models	All 1945 Models	All 1944 Models	All 1943 Models	All Older Models
Under 2,000 lbs.	$11.00	$ 9.50	$ 8.25	$ 6.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00
2,000-2,200 lbs., Inc.	17.00	15.50	12.75	10.50	7.65	7.50	7.50	7.50
2,201-2,400 " "	18.00	16.50	13.50	10.50	8.10	7.50	7.50	7.50
2,401-2,600 " "	19.00	17.10	14.25	11.40	8.55	7.50	7.50	7.50
2,601-2,800 " "	20.00	18.00	15.00	12.00	9.00	7.50	7.50	7.50
2,801-3,000 " "	21.00	18.90	15.75	12.60	9.45	7.50	7.50	7.50
3,001-3,200 " "	22.25	20.02	16.69	13.35	10.01	7.50	7.50	7.50
3,201-3,400 " "	23.50	22.05	18.13	15.50	11.42	7.65	7.50	7.50
3,401-3,600 " "	27.25	24.52	20.44	16.35	12.26	8.18	7.50	7.50
3,601-3,800 " "	30.75	27.62	23.06	18.45	13.84	9.23	7.50	7.50
3,801-4,000 " "	34.75	31.25	26.06	20.85	15.64	10.42	7.50	7.50
4,001-4,200 " "	45.00	40.50	33.75	27.00	20.25	13.50	7.50	7.50
4,201-4,400 " "	54.00	48.60	40.50	32.40	24.30	16.20	8.10	7.50
4,401-4,600 " "	57.00	51.30	42.75	34.20	25.65	17.10	8.55	7.50
4,601-4,800 " "	65.00	58.50	48.75	39.00	29.25	19.50	9.75	7.50
4,801 and over	75.00	67.50	56.25	45.00	33.75	22.50	11.25	7.50

ARREARS { Tax ___ Fees 30

1949 Tax 15 —

1949 Fees ___

Total ___

I, the undersigned, hereby apply for registration and affirm that I am the owner of the above described vehicle, and also that I have described it correctly.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

OWNER X By [illegible] at (Mason City, Iowa)
(Owner Sign Here) (Print or Stamp Name)

I RESIDE IN THE COUNTY OF Hennepin

I GET MY MAIL AT 1010 Roanoke Bldg, Mpls (2) Minn.
Postoffice Address (Street or R.F.D.) City P. O. Zone State

CERTIFICATE will be sent to this address before it is signed.

If plates are not to be sent to owner as above give name and address here ___

B 850657

Postoffice Address (Street or R.F.D.) City P. O. Zone State

Please do not send personal check (SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 377]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

IMPORTANT: Before filling out application, read other side.

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 21 and 22 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-19 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 20 on reverse side in addition.

Do Not Write in This Space. For Office Use Only.

B

30696

REC'D OCT 6 1949

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA } ss.
County of Kenn } Date Oct 6, 1949

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1949 Minnesota Registration No.
No. 86067

Here Attach Draft, Cashier's Check or Money Order.

Attach Registration Certificate Here If not attached, explain why.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

Have you read the law on the reverse side hereof in regard to that class? _____

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS ____
   Encircle the one you are registering.
   Tax: Find it by weight, table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   Tax: Find it by weight, see table below.
3. "PASSENGER CAR UTILITY TRAILER": CLASS "$Z" ____
   Tax: $2 per biennium, $1 for last year thereof.
   (This is new. See law on other side.)
4. "SNOWMOBILE": CLASS "S" ____
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.
5. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
6. "MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.

7. MAKE Pont
8. SERIAL NO. P6TA6428
9. MOTOR NO. P6TA 6428
10. YEAR & MODEL 1946-P6TA
11. TYPE 4 Dr.
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3335 lbs.

If passenger automobile, ambulance, hearse, house trailer or snowmobile, give manufacturers shipping weight. (If shipping weight is not available, attach official weight ticket.) For a trailer other than a house trailer, give maximum load carried at any one time.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgr. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older	Mfgr. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3001-3200	$22.50	$21.25	$16.25	$10.00	$ 8.75
2000-2200	16.80	15.00	12.50	10.00	7.50	3201-3400	30.00	28.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	3401-3600	45.10	33.25	22.75	11.25	11.25
2401-2600	20.00	16.00	12.50	10.00	7.50	3601-3800	51.00	38.75	26.00	12.00	12.00
2601-2800	21.60	16.20	12.50	10.00	7.50	3801-4000	58.50	43.00	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4001-4200	65.50	49.25	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4201-4400	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	4401-4600	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50	Over 4600					

ARREARS Tax 91
Fees _____
1950 Tax 1980
1950 Fees _____
Total _____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co (Northwestern States Portland Cement Co)
(Owner sign here) (Print or type name here)

14. I RESIDE IN THE COUNTY OF Kenn

15. I GET MY MAIL AT 1010 - Roanoke Bldg Mpls (2) Minn
Postoffice Address (Street or R.F.D.) City P. O. Zone State

CERTIFICATE will be sent to this address; be sure it is right.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____ 19____

Notary Public _____ County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

Please do not send personal check

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

B 31577

Here Attach Draft, Cashier's Check or Money Order.

For a class not listed hereon use other form where it is listed; form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

REC'D OCT 6 1950

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of _____ } ss. Date Oct 6, 1950

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No.
3 [illegible]

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3001-3500	$33.50	$24.98	$16.25	$16.00	$ 8.25
2000-2200	16.00	15.00	12.50	10.00	7.50	3501-4000	39.00	29.25	19.50	16.00	9.75
2201-2400	15.45	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.00	15.75	12.50	10.00	7.50	4401-4600	56.50	42.38	28.25	14.63	14.63
2801-3000	22.50	17.45	12.50	10.00	7.50	4601-4800	62.00	46.25	32.00	16.45	16.45
3001-3200	24.00	18.00	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.50	21.00	14.00	10.00	7.50						

3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "UZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1951).
4. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER":** CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE":** CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Ford
8. SERIAL No. P46A6428
9. YEAR & MODEL 46 —
10. TYPE 4d
11. Check kind of transmission: Standard ☐ Other ☐
12. No. of Cyl. ____ Pass. Cap. ____

Weight 3335 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "UZ" trailer give gross weight of load and vehicle.

ARREARS Tax ____ Fees ____
1951 Tax 1.00
1951 Fees 1.00
Total 2.00

Attach Registration Certificate Here. If not attached, explain why.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co. (Northwestern States Portland Cement Co.)
    Owner must sign here. 3018 Nicollet Blg. 3018 Nicollet (Bldg.)
14. I RESIDE IN THE CITY OF Minneapolis, Minnesota Minneapolis, Minnesota
15. I GET MY MAIL AT _____
    Postoffice Address (Street or R.F.D.) City P.O. Zone State
    CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____, 195__

Notary Public _____ County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

B 31577

Postoffice Address (Street or R.F.D.) City P.O. Zone State

Please do not write in this space

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 379]

30468

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

REC'D OCT 5 1951

1

Do Not Write in This Space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA,
County of Henn } ss. Date Oct 5, 1951

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Attach Registration Certificate Here. If not attached, explain why.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** ✓
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER": CLASS "HZ"** ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00
801-2000	15.20	15.00	12.50	10.00	7.50
2001-2200	16.80	15.00	12.50	10.00	7.50
2201-2400	18.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.60	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
3601-3800	33.30	24.98	16.65	10.00	8.33
3801-4000	39.00	29.25	19.50	10.00	9.75
4001-4200	45.10	33.83	22.55	11.28	11.28
4201-4400	51.60	38.70	25.80	12.90	12.90
4401-4600	58.50	43.88	29.25	14.63	14.63
4601-4800	65.80	49.35	32.90	16.45	16.45
4801-5000	73.50	55.13	36.75	18.38	18.38
Over 5000	75.00	56.25	37.50	18.75	18.75

3. **"PASSENGER CAR UTILITY TRAILER": CLASS "$Z"** ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. **"MOTORCYCLE": CLASS "MC"** ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR": CLASS "MBS"** ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE": CLASS "S"** ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

Give 1951 Minnesota Registration No. 31-577

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

7. **MAKE** Pont
8. **SERIAL NO.** 8eZH 6428
9. **YEAR & MODEL** 1946 - 4 Dr.
10. **TYPE** ____
11. **Check kind of transmission:** Standard ☐ Other ☐
12. **No. of Cyl.** ____ **Pass. Cap.** ____

Weight 3335 **lbs.**

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "$Z" trailer give gross weight of load and vehicle.

ARREARS Tax ____ Fees ____
1952 Tax 3 20
1952 Fees ____
Total ____

Please do not send personal check

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for payment of additional amount of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. **OWNER** X ____ Northwestern States Portland Cement Co
    Owner must sign here (Print or type name here)
14. **I RESIDE IN THE COUNTY OF** Ram.
15. **I GET MY MAIL AT** ____ Roanoke Bldg
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ **day of** ____, 195__

Notary Public ____ County, Minn. My commission expires ____

If plates are not to be sent to owner as above give name and address here ____ 30468

Postoffice Address (Street or R F D) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 13 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only

90633

Lake St. Pontiac Dre 720 E Lake St. Mpls

~~11:771:~~ 2-2-52 B

11/81 Rw

Triple O Testers 432-3rd Ave. So. Mpls.

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased _____

_____ 23. Date purchased _____, 195__
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA }
County of _____ } ss.

_____ being duly sworn says: That he is authorized to sign as agent for _____, licensed as dealer for _____ (Year) under No. _____;

that said licensed dealer on _____ (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from _____ (Whom) _____ (Address)

_____ (When) by _____ (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.);

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature _____

Subscribed and sworn to before me this _____ day of _____, 195__

SEAL

_____

Notary Public _____ County, Minn. My commission expires _____

[fol. 381]

PLAINTIFF'S EXHIBIT W

Official Seal of Minnesota

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated October 14, 1948 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1946 Pontiac, Model P6LA, 2door with motor and serial number P6LA6745, 1949 registration number 86066.

Application for Registration dated October 6, 1949 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1950 registration number 30697.

Application for Registration dated October 6, 1950 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1951 registration number 31578.

Posting of Transfers on reverse side of application covering same vehicle to Lake Street Pontiac, Inc., 720 E. Lake St., Minneapolis, Minnesota under date of May 25, 1951, Transfer No. 222902; and to Walter R. Siewert, 3924 Xenwood Avenue, St. Louis Park, Minnesota under date of May 29, 1951, Transfer No. 237666.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this

29th *day of* October,

*A. D. 19*54.

W

Secretary of State

3c.1

362

[fol. 382]

FORM 1H

APPLICATION FOR MOTOR VEHICLE REGISTRATION
USE THIS SIDE ONLY TO RE-REGISTER A VEHICLE REGISTERED IN MINNESOTA LAST YEAR

For new vehicle or one registered elsewhere use other side.

AUTOMOBILE—HEARSE—SCHOOL BUS (Cross out two)

To MIKE HOLM, Secretary of State

St. Paul, Minnesota

Date Oct 14 1948 194 8

Do not write in this space. 41

REC'D OCT 14

B 86066

Have Attached Cashier's Check or Money Order.

Do not Write in This Space. For Office Use Only.

Give 1948 Minnesota Registration No.

No. 31752

Make Pnt

Motor P62A 6745

Serial P62A 6745

Year & Model 1946 - P62A

Type 2 dr.

SHIPPING WEIGHT
(As shown on registration card)
3300 lbs.

If shipping weight is not available attach official weight ticket.

No. of Cylinders ___ Capacity ___ passengers.

IF VEHICLE IS A BUS is it operated ONLY as a School Bus ___?

(If not, this blank will not serve. Use Bus Form 5A)

Manufacturer's Shipping Weight	TAX IN ALL MAKES							
	All 1949 Models	All 1948 Models	All 1947 Models	All 1946 Models	All 1945 Models	All 1944 Models	All 1943 Models	All Older Models
Under 2,000 lbs.	$11.00	$ 9.90	$ 8.25	$ 6.60	$ 5.00	$ 5.00	$ 5.00	$ 5.00
2,000-2,200 lbs., Inc.	17.00	15.30	12.75	10.20	7.65	7.50	7.50	7.50
2,201-2,400 " "	18.00	16.20	13.50	10.80	8.10	7.50	7.50	7.50
2,401-2,600 " "	19.00	17.10	14.25	11.40	8.55	7.50	7.50	7.50
2,601-2,800 " "	20.00	18.00	15.00	12.00	9.00	7.50	7.50	7.50
2,801-3,000 " "	21.00	18.90	15.75	12.60	9.45	7.50	7.50	7.50
3,001-3,200 " "	23.25	20.92	16.80	13.95	10.01	7.50	7.50	7.50
3,201-3,400 " "	25.50	22.95	19.13	15.30	11.48	7.65	7.50	7.50
3,401-3,600 " "	27.25	24.53	20.44	16.35	12.26	8.18	7.50	7.50
3,601-3,800 " "	30.75	27.68	23.06	18.45	13.84	9.23	7.50	7.50
3,801-4,000 " "	34.75	31.28	26.06	20.85	15.64	10.43	7.50	7.50
4,001-4,200 " "	45.00	40.50	33.75	27.00	20.25	13.50	7.50	7.50
4,201-4,400 " "	54.00	48.60	40.50	32.40	24.30	16.20	8.10	7.50
4,401-4,600 " "	57.00	51.30	42.75	34.20	25.65	17.10	8.55	7.50
4,601-4,800 " "	65.00	58.50	48.75	39.00	29.25	19.50	9.75	7.50
4,801 and over	75.00	67.50	56.25	45.00	33.75	22.50	11.25	7.50

ARREARS { Tax ___ Fees 30

1949 Tax 15

1949 Fees ___

Total ___

Attach Registration Certificate Here.

If not attached, explain why.

Please do not send personal check

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

I, the undersigned, hereby apply for registration and affirm that I am the owner of the above described vehicle, and also that I have described it correctly.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

OWNER By R. Jamieson
Owner sign here

(Print Christian Name Here) (Mason City, Iowa)

RESIDE IN THE COUNTY OF Johnson

GET MY MAIL AT 1910 - 11 Roanoke Bldg Mpls (2) Minn
Postoffice Address (Street or R F D) City P. O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

If plates are not to be sent to owner as above give name and address here ___

R Bridges

Postoffice Address (Street or R F D) City P. O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 383]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

IMPORTANT: Before filling out application, read other side.

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 21 and 22 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-19 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 20 on reverse side in addition.

30697

REC'D OCT 6 1949

1

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA }
County of Ram } ss. Date Oct 6, 19 49

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Here Attach Dr vehicle's Check or Mo ber.

Attach Registration Certificate Here If not attached, explain why.

Give 1949 Minnesota Registration No.
No. 86066

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

Have you read the law on the reverse side hereof in regard to that class? _____

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS ____
   Encircle the one you are registering.
   Tax: Find it by weight, table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   Tax: Find it by weight, see table below.
3. "PASSENGER CAR UTILITY TRAILER": CLASS "$Z" ____
   Tax: $2 per biennium, $1 for last year thereof.
   (This is new. See law on other side.)
4. "SNOWMOBILE": CLASS "S" ____
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.
5. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
6. "MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.

7. MAKE Ford
8. SERIAL NO. P6LA-6745
9. MOTOR NO. P6LA 6745
10. YEAR & MODEL 1946 P6LA
11. TYPE 2 Dr
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3300 lbs.
If passenger automobile, ambulance, hearse, house trailer or snowmobile, give manufacturers shipping weight. (If shipping weight is not available, attach official weight ticket.) For a trailer other than a house trailer, give maximum load carried at any one time.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgr. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50
2000-2200	16.00	15.00	12.50	10.00	7.50
2201-2400	16.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.00	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50
3401-3600	28.00	21.00	14.00	10.00	7.50

Mfgr. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
3601-3800	29.60	22.20	14.80	10.00	7.50
3801-4000	30.00	23.25	19.50	16.00	9.75
4001-4200	45.10	33.83	22.55	11.30	11.30
4201-4400	51.00	38.70	25.80	12.90	12.90
4401-4600	56.50	42.38	28.25	14.60	14.60
4601-4800	66.50	49.85	33.90	16.45	16.45
4801-5000	72.50	54.13	36.75	18.38	18.38
Over 5000	78.00	54.25	37.50	18.75	18.75

ARREARS Tax 71
Fees
1950 Tax 1980
1950 Fees
Total

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

12. OWNER X Northwestern States Portland Cement Co. (Northwestern States Portland Cement Co.)
(Sign here) (Print or type name here)

14. I RESIDE IN THE COUNTY OF Ramsey

15. I GET MY MAIL AT 1010 - Roanoke Bldg Mpls (2) Minn.
Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address: be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____ 19____

Notary Public _____, County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

Please do send personal check

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

B 31578 8

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

Do Not Write in This Space.

REC'D OCT 6 1950

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of _____ } ss. Date Oct 6, 1950

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No. 30697

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

Attach Registration Certificate Here. If not attached, explain why.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3601-3800	$33.30	$24.98	$16.65	$16.00	$ 8.33
2000-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	13.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	13.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	13.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

7. MAKE Pont
8. SERIAL NO. P6 7A 6745
9. YEAR & MODEL 46 - P6LA
10. TYPE 2d.
11. Check kind of transmission: Standard ☐ Other ☐
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3300 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

3. "PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1951).
4. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. "MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. "SNOWMOBILE": CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

ARREARS { Tax _____ Fees 1980
1951 Tax _____
1951 Fees _____

TRANSFERRED

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X 1010 Roanok[illegible] Northwestern States Port[illegible]
    Owner must sign here
    Minneapolis, Minn[illegible] Northwestern States Port[illegible]
    1010 Roanoke Blvd (Number and Street or R.F.D.)
    Minneapolis, Minne[illegible]
14. I RESIDE IN THE COUNTY OF Hennepin
15. I GET MY MAIL AT _____
    Postoffice Address (Street or R.F.D.) City P.O. Zone State
    CERTIFICATE will be sent to this address, be sure it is clear.

Please do not ✓ personal check

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____, 195__

Notary Public _____ County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

B 31578

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15, LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 385]

222902 **Please do not send personal check**

Lake Street Pontiac 31578
Inc., 720 E. Lake St 5-25-51
Mpls.

mit by certified check, American Express or U. S. Postal money order, or bank which personal checks are submitted will be held up for 12 days after deposit. clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return in the correspondence, it is well to add the old registration number or applicant's address. Board issued

237666

Walter R.Siewert, 31578
3924 Xenwood Ave 5-29-51
St.Louis Park.Mpls. M 73546

Space Reserved for Office Use Only. Do Not Write in This

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____ (Date)

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased _____

_____ 23. Date purchased _____, 195__
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA }
County of _____ } ss.

_____ being duly sworn says: That he is authorized to sign as agent for _____, licensed as dealer for _____ (Year) under No. _____;

that said licensed dealer on _____ (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from _____
(Whom) (Address)

_____ by _____;
(When) (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.)

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature _____

Subscribed and sworn to before me this _____ day of _____, 195__

SEAL

_____

Notary Public _____ County, Minn. My commission expires _____

[fol. 386]

PLAINTIFF'S EXHIBIT X

United States of America.

36826

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated October 14, 1948 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering a 1941 Oldsmobile, Model S76, Club Sedan with motor number G3677765, serial number 76-52519, 1949 registration number 86065.

Application for Registration dated October 6, 1949 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1950 registration number 30695.

Application for Registration dated October 6, 1950 in the name of Northwestern States Portland Cement Company, 1010 Roanoke Building, Minneapolis, Minnesota, covering same vehicle, 1951 registration number 31576.

Motor Vehicle Department Form 73 bearing number 37930P, showing transfer of registration number 31576 to George W. Watson, 3924 Fifteenth Avenue South, Minneapolis, Minnesota under date of June 8, 1951, with payment of additional fee in the amount of 50 cents.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this

29th *day of* October,

A. D. 19 54.

Secretary of State

386

[fol. 387]

FORM 1H

APPLICATION FOR MOTOR VEHICLE REGISTRATION
USE THIS SIDE ONLY TO RE-REGISTER A VEHICLE REGISTERED IN MINNESOTA LAST YEAR

For new vehicle or one registered elsewhere use other side.

AUTOMOBILE—HEARSE—SCHOOL BUS (Cross out two)

To MIKE HOLM, Secretary of State

St. Paul, Minnesota

Date Oct 14 1948

REC'D OCT 14 1948

Do not write in this space.

B 86065

Cashier's Check or Money Order

Here Attach

Attach Registration Certificate Here.

If not attached, explain why.

Do not Write in This Space. For Office Use Only.

Give 1948 Minnesota Registration No.

No. 31753

Make Olds

Motor 9367765

Serial 76-52579

Year & Model 1941-576

Type 4 Dr Sed

SHIPPING WEIGHT
(As shown on registration card)

_____ lbs.

If shipping weight is not available attach official weight ticket.

Manufacturer's Shipping Weight	TAX IN ALL MAKES							
	All 1949 Models	All 1948 Models	All 1947 Models	All 1946 Models	All 1945 Models	All 1944 Models	All 1943 Models	All Older Models
Under 2,000 lbs.	$11.00	$ 9.90	$ 8.25	$ 6.60	$ 5.00	$ 5.00	$ 5.00	$ 5.00
2,000-2,200 lbs., Inc.	17.00	15.30	12.75	10.20	7.65	7.50	7.50	7.50
2,201-2,400 " "	18.00	16.20	13.50	10.80	8.10	7.50	7.50	7.50
2,401-2,600 " "	19.00	17.10	14.25	11.40	8.55	7.50	7.50	7.50
2,601-2,800 " "	20.00	18.00	15.00	12.00	9.00	7.50	7.50	7.50
2,801-3,000 " "	21.00	18.90	15.75	12.60	9.45	7.50	7.50	7.50
3,001-3,200 " "	22.25	20.03	16.69	13.35	10.01	7.50	7.50	7.50
3,201-3,400 " "	25.50	22.95	19.13	15.30	11.48	7.65	7.50	7.50
3,401-3,600 " "	27.25	24.53	20.44	16.35	12.26	8.18	7.50	7.50
3,601-3,800 " "	30.75	27.68	23.06	18.45	13.84	9.23	7.50	7.50
3,801-4,000 " "	34.75	31.28	26.06	20.85	15.64	10.43	7.50	7.50
4,001-4,200 " "	45.00	40.50	33.75	27.00	20.25	13.50	7.50	7.50
4,201-4,400 " "	54.00	48.60	40.50	32.40	24.30	16.20	8.10	7.50
4,401-4,600 " "	57.00	51.30	42.75	34.20	25.65	17.10	8.55	7.50
4,601-4,800 " "	65.00	58.50	48.75	39.00	29.25	19.50	9.75	7.50
4,801 and over	75.00	67.50	56.25	45.00	33.75	22.50	11.25	7.50

If VEHICLE IS A BUS is it operated ONLY as a School Bus _____?

(If not, this blank will not serve. Use Bus Form 5A)

No. of Cylinders ___ Capacity ___ passengers.

ARREARS { Tax _____ Fees _____

1949 Tax 1.50

1949 Fees _____

Total _____

I, the undersigned, hereby apply for registration and affirm that I am the owner of the above described vehicle, and also that I have described it correctly.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

Signed By [illegible] (Owner must sign here) (Print or type name here) Sioux City, Iowa

I RESIDE IN THE COUNTY OF Tenhessis

I GET MY MAIL AT 1510 Roanoke Bldg, Sioux City (2) Iowa

(Postoffice Address (Street or R.F.D.) (City) (P. O. Zone) (State)

CERTIFICATE will be sent to this address; be sure it is clear.

If plates are not to be sent to owner as above give name and address here _____

(Street or R.F.D.) (City) (P. O. Zone) (State)

Please do not send personal check

SEE INSTRUCTIONS ON REVERSE SIDE OF BLANK

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

IMPORTANT: Before filling out application, read other side.

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 21 and 22 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-19 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 20 on reverse side in addition.

REC'D OCT 6 1949

30695

Do Not Write in This Space. For Office Use Only

Here Attach Draft, Cashier's Check or Money Order.

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA } ss.
County of [illegible] Date Oct 6, 19 49

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1949 Minnesota Registration No.
No. 86065

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

Have you read the law on the reverse side hereof in regard to that class? _____

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE":** CLASS ____
   Encircle the one you are registering.
   Tax: Find it by weight, table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   Tax: Find it by weight, see table below.
3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "$Z" ____
   Tax: $2 per biennium, $1 for last year thereof.
   (This is new. See law on other side.)
4. **"SNOWMOBILE":** CLASS "S" ____
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.
5. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
6. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER":** CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.

7. MAKE Olds
8. SERIAL NO. 16-52519
9. MOTOR NO. 136776
10. YEAR & MODEL 941-476
11. TYPE Club Sed
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3300 **lbs.**
If passenger automobile, ambulance, hearse, house trailer or snowmobile, give manufacturers shipping weight. (If shipping weight is not available, attach official weight ticket.) For a trailer other than a house trailer, give maximum load carried at any one time.

Attach Registration Certificate Here If not attached, explain why.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50
2000-2200	16.80	15.00	12.50	10.00	7.50
2201-2400	18.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.60	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50
3401-3600	28.00	21.00	14.00	10.00	7.50

Mfgs. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
3601-3800	$33.50	$24.98	$16.65	$10.00	$ 8.33
3801-4000	30.60	29.25	19.50	10.00	9.75
4001-4200	45.10	33.83	22.55	11.28	11.28
4201-4400	51.00	38.70	25.80	12.90	12.90
4401-4600	58.50	43.88	29.25	14.63	14.63
4601-4800	65.80	49.35	32.90	16.45	16.45
4801-5000	73.50	55.13	36.75	18.38	18.38
Over 5000	75.00	56.25	37.50	18.75	18.75

ARREARS Tax _____ Fees _____

1950 Tax 10 00

1950 Fees _____

Total _____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co (Northwestern States Portland Cement Co)
(Owner must also sign here) (Print or type name here)

14. I RESIDE IN THE COUNTY OF [illegible]

15. I GET MY MAIL AT 1010 Roanoke Bldg Minneapolis Minn
Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address: be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____ 19__

Notary Public _____, County, Minn. My commission expires _____

Please do send personal check
(SEE INS). ...IONS ON REVERSE SIDE HEREOF)

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 389]

B 31576

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

Here Attach Draft, Cashier's Check or Money Order.

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

REC'D OCT 6 1950

Please Write in This Space

STATE OF MINNESOTA
County of _____ } ss. **Date** Oct 6, 1950

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No. 30695

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3601-3800	$33.30	$24.98	$16.65	$10.00	$ 6.33
2000-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.26	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	13.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.62	14.62
2801-3000	23.20	17.40	13.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	13.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

Make Olds

Serial No. 76-52517

Year & Model 41-816

Type Cl Sed.

Check kind of transmission: Standard ☐ Other ☐

No. of Cyl. ____ **Pass. Cap.** ____

Weight 3300 **lbs.**

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "HZ" trailer give gross weight of load and vehicle.

3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1951).
4. **"MOTORCYCLE":** CLASS "M" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER":** CLASS "MB" ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE":** CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

TRANSFERRED

ARREARS Tax ____ Fees ____

1951 Tax ____

1951 Fees ____

Total ____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. **OWNER** X Northwestern States Po[illegible] (Owner must sign here) (Print or type name here)

14. **I RESIDE IN THE CITY OF** Minneapolis, [illegible]

15. **I GET MY MAIL AT** _____
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address, be sure it is clear.

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

SEAL

Subscribed and sworn to before me this ____ **day of** _____, 195__

Notary Public _____ **County, Minn. My commission expires** _____

If plates are not to be sent to owner as above give name and address here _____

B 31576

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

Attach Registration Certificate Here. If not attached, explain why.

Please do not use personal check

244450

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Expr
draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted w
for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for
of application. Especially when more than one application is forwarded in the same envelope, it is well to put
name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only

5/23/51 Pw. P 37930

[redacted]

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased _____

_____ City _____ State 23. Date purchased _____, 195__

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of _____ } ss.

_____ being duly sworn says: That he is authorized to sign as agent for _____, licensed as dealer for _____ (Year) under No. _____;

that said licensed dealer on _____ (Date) sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from _____ (Whom) _____ (Address)

_____ (When) by _____ (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used);

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature _____

Subscribed and sworn to before me this _____ day of _____, 195__

_____

Notary Public _____ County, Minn. My commission expires _____

SEAL.

Form 78

STATE OF MINNESOTA
MOTOR VEHICLE DEPARTMENT

244450

No 37930 P

money order, or bank
2 days after deposit.
ION to avoid return
umber or applicant's

Transfer with Added Fee

Received $.50 ¢ in payment of penalty for delayed
transfer of registration No. 31576—
New Owner George W. Stratton
Address 3924-[illegible]
Date Filed 6/8/51— Mike Holm
Deputy R

[fol. 391]

PLAINTIFF'S EXHIBIT Y

United States of America

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated November 5, 1948 in the name of Northwestern States Portland Cement Company, Mason City, Iowa, covering a 1946 Dodge, Model D24, Custom 4door with motor number D24-48433, serial number 30691655, 1949 registration number 237696.

Application for Registration dated October 14, 1949 in the name of Northwestern States Portland Cement Company, Mason City, Iowa, covering same vehicle, 1950 registration number 235840.

Application for Registration dated October 20, 1950 in the name of Northwestern States Portland Cement Company, Mason City, Iowa, covering same vehicle, 1951 registration number 236370.

Application for Registration dated October 19, 1951 in the name of Northwestern States Portland Cement Company, Mason City, Iowa, covering same vehicle, 1952 registration number 236230. Reverse side of application showing posting of transfer to Harry John Bissett, 904 E. 5th Street, Willmar, Minnesota, under date of March 5, 1952, Transfer No. B 44954.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this 29th *day of* October, *A. D. 19* 54.

Mrs. Mike Holm

Secretary of State

391

[fol. 392]

FORM 1H

APPLICATION FOR MOTOR VEHICLE REGISTRATION
USE THIS SIDE ONLY TO RE-REGISTER A VEHICLE REGISTERED IN MINNESOTA LAST YEAR

For new vehicle or one registered elsewhere use other side.

AUTOMOBILE—HEARSE—SCHOOL BUS (Cross out two)

To MIKE HOLM, Secretary of State

St. Paul, Minnesota

Date Nov 5 1948

237696

Rec'd. 23

Nov 5

Here Attach Cashier's Check or Money Order.

Do not Write In This Space. For Office Use Only.

Give 1948 Minnesota Registration No.

No. 238427

Make Dodge

Motor D24 484433

Serial 3069165-5-

Year & Model 1946 D24

Type Cus 4d

SHIPPING WEIGHT
(As shown on registration card)

3254 lbs.

If shipping weight is not available attach official weight ticket.

No. of Cylinders ___ Capacity ___ passengers.

IF VEHICLE IS A BUS is it operated ONLY as a School Bus ___?

(If not, this blank will not serve. Use Bus Form 5A)

Manufacturer's Shipping Weight	TAX IN ALL MAKES							
	All 1949 Models	All 1948 Models	All 1947 Models	All 1946 Models	All 1945 Models	All 1944 Models	All 1943 Models	All Older Models
Under 2,000 lbs.	$11.00	$ 9.00	$ 8.25	$ 6.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00
2,000-2,200 lbs., Inc.	17.00	15.30	12.75	10.20	7.65	7.50	7.50	7.50
2,201-2,400 " "	18.00	16.20	13.50	10.80	8.10	7.50	7.50	7.50
2,401-2,600 " "	19.00	17.10	14.25	11.40	8.55	7.50	7.50	7.50
2,601-2,800 " "	20.00	18.00	15.00	12.00	9.00	7.50	7.50	7.50
2,801-3,000 " "	21.00	18.90	15.75	12.60	9.45	7.50	7.50	7.50
3,001-3,200 " "	22.25	20.02	16.69	13.35	10.01	7.50	7.50	7.50
3,201-3,400 " "	25.50	22.95	19.13	15.30	11.48	7.65	7.50	7.50
3,401-3,600 " "	27.25	24.53	20.44	16.35	12.26	8.18	7.50	7.50
3,601-3,800 " "	30.75	27.68	23.06	18.45	13.84	9.23	7.50	7.50
3,801-4,000 " "	34.75	31.28	26.06	20.85	15.64	10.43	7.50	7.50
4,001-4,200 " "	45.00	40.50	33.75	27.00	20.25	13.50	7.50	7.50
4,201-4,400 " "	54.00	48.60	40.50	32.40	24.30	16.20	8.10	7.50
4,401-4,600 " "	57.00	51.30	42.75	34.20	25.65	17.10	8.55	7.50
4,601-4,800 " "	65.00	58.50	48.75	39.00	29.25	19.50	9.75	7.50
4,801 and over	75.00	67.50	56.25	45.00	33.75	22.50	11.25	7.50

ARREARS { Tax ___ Fees ___

1949 Tax 15.30

1949 Fees ___

Total 15.30

If not attached, explain why.

Attach Registration Certificate Here.

I, the undersigned, hereby apply for registration and affirm that I am the owner of the above described vehicle, and also that I have described it correctly.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

OWNER W. H. Stutes Portland Cement Co. Northwestern State Portland Cement Co
(Owner must sign here) (Print or type name here)

I RESIDE IN THE COUNTY OF ___

I GET MY MAIL AT Mason City Iowa
(Postoffice Address (Street or R.F.D.) City P. O. Zone State)

CERTIFICATE will be sent to this address; be sure it is clear.

If plates are not to be sent to owner as above give name and address here ___
(Postoffice Address (Street or R.F.D.) City P. O. Zone State)

Please do not send personal check

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

312 NOVEMBER IS LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 393]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

IMPORTANT: Before filling out application, read other side.

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 21 and 22 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-19 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 20 on reverse side in addition.

Here Attach Dealer's Check or Money Order

Attach Registration Certificate Here If not attached, explain why.

Please do not send personal check

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Do Not Write In This Space. For Office Use Only.

235846

Rec'd. 23

Oct 4 41

Give 1949 Minnesota Registration No.

No. 2376 T6

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA

County of Itasca } ss. Date Oct 1, 19 41

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

Have you read the law on the reverse side hereof in regard to that class? _____

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS E
   Encircle the one you are registering.
   Tax: Find it by weight, table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   Tax: Find it by weight, see table below.
3. "PASSENGER CAR UTILITY TRAILER": CLASS "$Z" ____
   Tax: $2 per biennium, $1 for last year thereof.
   (This is new. See law on other side.)
4. "SNOWMOBILE": CLASS "S" ____
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.
5. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
6. "MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.

7. MAKE Ford
8. SERIAL NO. 2 06 776 5
9. MOTOR NO. 24-4843
10. YEAR & MODEL 1936 d24
11. TYPE Cus 4d
12. No. of Cyl. ____ Pass. Cap. ____

Weight 3254 lbs.

If passenger automobile, ambulance, hearse, house trailer or snowmobile, give manufacturers shipping weight. (If shipping weight is not available, attach official weight ticket.) For a trailer other than a house trailer, give maximum load carried at any one time.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50
2000-2200	16.80	15.00	12.50	10.00	7.50
2201-2400	18.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.60	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50
3401-3600	28.00	21.00	14.00	10.00	7.50
3601-3800	$33.30	$24.98	$16.65	$10.00	$ 8.33
3801-4000	39.00	29.25	19.50	10.00	9.75
4001-4200	45.10	33.83	22.55	11.28	11.28
4201-4400	51.60	38.70	25.80	12.90	12.90
4401-4600	58.50	43.88	29.25	14.63	14.63
4601-4800	65.80	49.35	32.90	16.45	16.45
4801-5000	73.50	55.13	36.75	18.38	18.38
Over 5000	75.00	56.25	37.50	18.75	18.75

ARREARS Tax _____ Fees _____

1950 Tax 14.80

1950 Fees _____

Total 14.80

I understand that any plate issued to me hereunder may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER Walter Voit Grant (Owner must sign here) Walter Voit Grant (Print or type name here)

14. I RESIDE IN THE COUNTY OF Itasca

15. I GET MY MAIL AT Marcell (Postoffice Address (Street or R.F.D.)) Marcell (City) (P. O. Zone) Minn (State)

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ day of ____ 19__

Notary Public _____, County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

374

[fol. 394]

Form AA

Here Attach Draft, Cashier's Check or Money Order.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

51

Do Not Write in This Space

RCD 25

sect 20-50

STATE OF MINNESOTA } ss.

County of _____ Date _____, 195__

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No. L 35 840

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** ✓
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.

2. **"HOUSE TRAILER":** **CLASS "HZ"** ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3601-3800	$33.30	$24.98	$16.65	$10.00	$ 8.33
2000-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.83	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

3. **"PASSENGER CAR UTILITY TRAILER":** **CLASS "SZ"** ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1951).

4. **"MOTORCYCLE":** **CLASS "MC"** ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.

5. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER":** **CLASS "MBS"** ____
   Encircle the one you are registering. Tax: $1.

6. **"SNOWMOBILE":** **CLASS "S"** ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. **MAKE** Dodge
8. **SERIAL NO.** 30,691,653
9. **YEAR & MODEL** 46 D24
10. **TYPE** Cus 4d.
11. **Check kind of transmission:** Standard ☒ Other ☐
12. **No. of Cyl.** 6 **Pass. Cap.** 5

Weight 3250 **lbs.**

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS Tax _____ Fees _____

1951 Tax _____

1951 Fees _____

Total _____

Attach Registration Certificate Here. If not attached, explain why.

Please do not send personal check

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax that may be discovered to be necessary when this application is checked at St. Paul.

13. **OWNER** X Stephen Saunders North Western Sate Corp
    Owner must sign here (Print or type name here)
14. **I RESIDE IN THE COUNTY OF** Cerro Gordo
15. **I GET MY MAIL AT** Mason City, Iowa
    Post Office Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address, be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ **day of** _____, 195__

_____
Notary Public _____ **County, Minn. My commission expires**

If plates are not to be sent to owner as above give name and address here _____

_____
Post Office Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

3/14

[fol. 395]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

23623 0

RECEIPT

Do Not Write in This Space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA } ss.
County of _____ } Date _____, 195__

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1951 Minnesota Registration No. 236 370

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS ____**
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.

2. **"HOUSE TRAILER": CLASS "HZ" ____**
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00
801-2000	15.20	15.00	12.50	10.00	7.50
2001-2200	16.80	15.00	12.50	10.00	7.50
2201-2400	18.40	15.00	12.50	10.00	7.50
2401-2600	20.00	15.00	12.50	10.00	7.50
2601-2800	21.60	16.20	12.50	10.00	7.50
2801-3000	23.20	17.40	12.50	10.00	7.50
3001-3200	24.80	18.60	12.50	10.00	7.50
3201-3400	26.40	19.80	13.20	10.00	7.50

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
3601-3800	33.30	24.98	16.65	10.00	8.33
3801-4000	39.00	29.25	19.50	10.00	9.75
4001-4200	45.10	33.83	22.55	11.28	11.28
4201-4400	51.60	38.70	25.80	12.90	12.90
4401-4600	58.50	43.88	29.25	14.63	14.63
4601-4800	65.80	49.35	32.90	16.45	16.45
4801-5000	73.50	55.13	36.75	18.38	18.38
Over 5000	75.00	56.25	37.50	18.75	18.75

3. **"PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____**
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).

4. **"MOTORCYCLE": CLASS "MC" ____**
   Does it have a side car or three wheels?
   Tax: Without side car $3, with side car or 3 wheels $5.

5. **"MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR": CLASS "MBS" ____**
   Encircle the one you are registering. Tax: $1.

6. **"SNOWMOBILE": CLASS "S" ____**
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose
   Tax $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Nash
8. SERIAL NO. 506916553
9. YEAR & MODEL 46 Lan
10. TYPE Duo 4d
11. Check kind of transmission: Standard ☑ Other ☐
12. No. of Cyl. ____ Pass. Cap. ____

Weight 3454 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

TRANSFERRED

ARREARS { Tax ____ Fees ____
1952 Tax 13.20
1952 Fees ____
Total 13.20

Attach Registration Certificate Here. If not attached, explain why.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment fee, etc. that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X [signature] (Print or type name here)
Owner must sign here

14. I RESIDE IN THE COUNTY OF ____

15. I GET MY MAIL AT ____
(Box, Rte. Address, Street or R F D) City P O Zone State

CERTIFICATE will be sent to this address, be sure it is clear.

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant

SEAL

Subscribed and sworn to before me this ____ day of ____, 195

Notary Public ____ County, Minn. My commission expires ____

If plates are not to be sent to owner as above give name and address here ____

(Box, Rte. Address, Street or R F D) City P O Zone State

Please do not fold personal check

SEE INSTRUCTIONS ON REVERSE SIDE HEREOF

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 12 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft, so as to be sure that it will be connected with the right application.

Do Not Write in This Space For Office Use Only

168447

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ (Date) 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____ (Date)

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased _____

_____ 23. Date purchased _____, 195__
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA }
County of _____ } ss.

_____ being duly sworn says: That he is authorized to sign as agent for _____, licensed as dealer for _____ (Year) under No. _____;

that said licensed dealer on _____ (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from _____

_____ (Whom) _____ (Address)

_____ (When) by _____ (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used)

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature _____

Subscribed and sworn to before me this _____ day of _____, 195__

SEAL

Notary Public _____ County, Minn. My commission expires _____

314

[fol. 397]

PLAINTIFF'S EXHIBIT Z

United States of America

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated January 24, 1952 in the name of Northwestern States Portland Cement Company, Box 683, Willmar, Minnesota, covering a 1952 Dodge, Model D42, Meadowbrook 4door with serial number 31893420, 1952 registration number 547515.

Dealer's Report of Sale on reverse side of application covering same vehicle, executed to show sale from Johnson-Giere Motor Company, Willmar, Minnesota to Northwestern States Portland Cement Company under date of January 25, 1952.

Application for Registration dated November 14, 1952 in the name of Northwestern States Portland Cement Company, Box 683, Willmar, Minnesota, covering same vehicle, 1953 registration number 52929°.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this 29th *day of* October,

A. D. 19 54.

Secretary of State

24 >>

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

547515
Rec'd.
JAN 2

Do Not Write in This Space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Kandiyohi } ss. Date Jan 24, 1952

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1951 Minnesota Registration No.
M 1

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** X
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "$Z" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR":** CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE":** CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. **MAKE** Dodge
8. **SERIAL NO.** 31893420
9. **YEAR & MODEL** 1952 D42
10. **TYPE** Meadowbrook 4 dr.
11. **Check kind of transmission:** Standard ☒ Other ☐
12. **No. of Cyl.** 6 **Pass. Cap.** 6

3355
Weight ____ lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "$Z" trailer give gross weight of load and vehicle.

Refund 1.60

ARREARS Tax ____
Fees ____

1952 Tax 2.00

1952 Fees ____

Total ____

I understand that any plate issued to me hereunder may be seized at any time if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be unpaid at the time this application is checked at St. Paul.

13. **OWNER** X ____ (Cement Co. by R. H. Sigg)
Owner must sign here (Print or type name here)

14. **I RESIDE IN THE COUNTY OF** Kandiyohi

15. **I GET MY MAIL AT** Rt 683 Willmar Minn
Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this 24 day of Jan, 1952

R. J. Winkler

Notary Public ____ County, Minn. My commission expires ____

NOTARY PUBLIC, KANDIYOHI COUNTY, MINN.
My Commission Expires

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Please do not send personal check (SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Attach Registration Certificate Here. If not attached, explain why.

[fol. 399]

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 12 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Write in This Space. For Office Use Only

Mor

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? (Date) _____ Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? (Date) _____ 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? (Date) _____

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased Johnson Store Mtr Co

Williston — ND

City — State

23. Date purchased 1/25, 195 2

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA }
County of Pennington } ss.

J. N. Lyle being duly sworn says: That he is authorized to sign as agent for Johnson Store Mtr Co, licensed as dealer for 1952 (Year) under No. 2033;

that said licensed dealer on 2/5/52 (Date) sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from Chevrolet Co (Whom) Detroit Michigan (Address)

2/5/52 (When) by Clark Transport Co. (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.);

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature J. N. Lyle

Subscribed and sworn to before me this 25 day of Jan, 195 2

V. J. Winkler

Notary Public Pennington County, Minn. My commission expires _____

SEAL

Form AA

DO NOT SEND PERSONAL CHECK

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Here Attach Draft, Cashier's Check or Money Order.

Attach Registration Certificate Here. If not attached, explain why.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

Answer all questions on this side pertinent to the registration of your vehicle and, if the vehicle is a new one, a used one from another state or a home made one not previously registered, answer the questions pertinent thereto on the reverse side hereof.

TE OF MINNESOTA } ss.
nty of _____

To the Registrar of Motor Vehicles
St. Paul, Minnesota
Date _____ 195_____

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is hereby listed for registration and taxation under the laws of the State of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE" CLASS:** _____
"Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
Tax: Find it by weight, table below (Item 6).

2. **"HOUSE TRAILER" CLASS:** "HZ"_____
"House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
Tax: Find it by weight, table below (Item 6).

3. **"PASSENGER CAR UTILITY TRAILER" CLASS:** "$Z"_____
Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
Have you read the law above and do you certify that your trailer meets all the conditions prescribed therein?_____ (Must be answered).
Tax: $2 per biennium, $1 for last year thereof (1953).

4. **"MOTORCYCLE" CLASS:** "MC"_____
Does it have a side car or three wheels?_____
Tax: Without side car $3, with side car or 3 wheels, $5.

5. **"MOTOR SCOOTER", "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR" CLASS:** "MBS"_____
Encircle the one you are registering. Tax: $1.

(DO NOT WRITE IN THIS SPACE)

6 PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs Shipping Weight in lbs	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older	Mfgs Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	13.20	15.00	12.50	10.00	7.50	3601-3800	30.80	24.06	16.05	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	30.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.85	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.80	16.80	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.50	49.35	32.90	16.45	16.45
30	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	16.38	16.38
3	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	16.75	16.75

If plates are not to be sent to owner as in item 15 give name and address below

(Name) _____

Postoffice Address (Street or R F D) _____

(City and State) _____

Do Not Write in This Space

9

REC'D 23

Give 1952 Minnesota

Registration No._____
If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

7. **MAKE**_____
8. **SERIAL NO.** 8
9. **YEAR & MODEL**_____
10. **TYPE**_____
11. **Check kind of transmission:**
Standard ☐ **Standard with overdrive** ☐ **Other** ☐
"Other" includes Automatic, Dynaflow, Ford-o-matic, Gyromatic, Hydra-matic, Merc-o-matic, Powerglide, Prestomatic, Tip-toe Hydraulic, and Ultramatic.
12. **No. of Cyl.**_____ **Pass. Cap.**_____

Weight_____ lbs.
If passenger automobile, ambulance, hearse, house trailer, or station wagon, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.)

_____

Arrears { **Tax**_____ / **Fees**_____

1953 Tax_____

1953 Fees_____

Total_____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. X _____
(Owner must sign on above line opposite X)

_____
(Print or type name here)

14. _____
(County of residence)

15. _____
Postoffice Address (Street or R.F.D.)

_____
(City) (P.O. Zone) (State)

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ **day of** _____, 195_____

SEAL

_____
Notary Public_____ **County, Minn.**

My commission expires_____

4 ✓ **NOVEMBER 16 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.** E A

[fol. 401]

Plaintiff's Exhibit AA

United States of America

36828

STATE OF MINNESOTA

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated February 22, 1952 in the name of Northwestern States Portland Cement Company, 516 Third Street S. W., Faribault, Minnesota, covering a 1952 Chevrolet Deluxe Styleline 2door with serial number 21KKB11922, 1952 registration number 876358.

Dealer's Report of Sale on reverse side of application covering same vehicle, executed to show sale from Lockwood Auto Company, Faribault, Minnesota to Northwestern States Portland Cement Company under date of February 22, 1952.

Application for Registration dated November 13, 1952 in the name of Northwestern States Portland Cement Company, covering same vehicle, 1953 registration number 179031.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this

29th *day of* October,

A. D. 19 54.

Secretary of State

401

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

$ 76 00

Do Not Write in This Space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Rice } ss. **Date** 2-22-52 , 195__

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1951 Minnesota Registration No. Rur

If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE" AMBULANCE, HEARSE": CLASS** *
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium; $1 for last year thereof (1953).
4. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. **"MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR":** CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. **"SNOWMOBILE":** CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

Attach Registration Certificate Here. If not attached, explain why.

Rur

7. **MAKE** Chevrolet
8. **SERIAL NO.** 21KKB11922
9. **YEAR & MODEL** 1952
10. **TYPE** Dlx. Style 2 dr.
11. **Check kind of transmission:** Standard ☐ Other ☒
12. **No. of Cyl.** 6 **Pass. Cap.** 5

Weight 3240 **lbs.**

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "SZ" trailer give gross weight of load and vehicle.

ARREARS Tax _____ Fees _____

1952 Tax 24.20

1952 Fees _____

Total 24.20

Please do not send personal checks

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. **OWNER** X Northwestern States Portland Cement Company
    Owner must sign here (Print or type name here)
14. **I RESIDE IN THE COUNTY OF** Rice
15. **I GET MY MAIL AT** 516 3rd St. W. Faribault Minn.
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ day of February, 195 2

Notary Public Rice County, Minn. My commission expires 12-12-57

RUTH MORRIS

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

[fol. 403]

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 12 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased Lockwood Auto Co.

Faribault, Minn. 23. Date purchased 2-22-52, 195__
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of Rice } ss.

C. A. Lockwood being duly sworn says: That he is authorized to sign as agent for Lockwood Auto Co., licensed as dealer for 1952 (Year) under No. 615;

that said licensed dealer on 2-22-52 (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from Chevrolet Motor Division (Whom) Janesville, Wis. (Address)

2-18-52 (When) by Milwaukee R.R. (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used.);

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is clearly noted in this application for registration.

Signature C. A. Lockwood

Subscribed and sworn to before me this 22 day of February, 1952

Ruth Thomas

Notary Public Rice County, Minn. My commission expires 12-12-57

RUTH MORRIS THOMAS
Notary Public, Rice County, Minnesota
My Commission Expires Dec. 12, 1957

SEAL

384

[fol. 404]

Form AA

DO NOT SEND PERSONAL CHECK

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

Here Attach Draft, Cashier's or Money Order

Attach Registration Certificate Here. If not attached, explain why.

Do Not Write in This Space

179-C31

NOV 13 1952

D645

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

Answer all questions on this side pertinent to the registration of your vehicle and, if the vehicle is a new one, a used one from another state or a home made one not previously registered, answer the questions pertinent thereto on the reverse side hereof.

STATE OF MINNESOTA
ss.
County of Ramsey

To the Registrar of Motor Vehicles
St. Paul, Minnesota
Date _____ 195_

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is hereby listed for registration and taxation under the laws of the State of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE" CLASS: C
"Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
Tax: Find it by weight, table below (Item 6).

2. "HOUSE TRAILER" CLASS: "HZ"_____
"House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
Tax: Find it by weight, table below (Item 6).

3. "PASSENGER CAR UTILITY TRAILER" CLASS: "$Z"_____
Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
Have you read the law above and do you certify that your trailer meets all the conditions prescribed therein?_____ (Must be answered).
Tax: $2 per biennium, $1 for last year thereof (1953).

4. "MOTORCYCLE" CLASS: "MC"_____
Does it have a side car or three wheels?_____
Tax: Without side car $3, with side car or 3 wheels, $5.

5. "MOTOR SCOOTER", "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR" CLASS: "MBS"_____
Encircle the one you are registering. Tax: $1.

(DO NOT WRITE IN THIS SPACE)

6. PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1953 1952 1951	1950 1949 1948	1947 1946 1945	1944 to 1935	1934 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$5.00	3401-3600	$28.80	$21.60	$14.40	$10.80	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	30.00	24.00	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	30.00	25.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.85	22.55	11.25	11.25
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	45.00	29.25	14.65	14.65
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.00	49.35	32.90	16.45	16.45
3001-3200	24.80	18.00	12.50	10.00	7.50	4801-5000	75.00	56.15	36.75	18.35	18.35
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

If plates are not to be sent to owner as in item 15 give name and address below

(Name) _____

Postoffice Address (Street or R.F.D.) _____

(City and State) _____

Give 1952 Minnesota Registration No. 876358

If not previously registered in Minnesota answer items pertinent to your registration on reverse side hereof.

7. MAKE Olds
8. SERIAL NO. 21KKB11922
9. YEAR & MODEL 1952 Super 88
10. TYPE _____
11. Check kind of transmission:
Standard ☐ Standard with overdrive ☐ Other ☐
"Other" includes Automatic, Dynaflow, Ford-o-matic, Gyromatic, Hydra-matic, Merc-o-matic, Powerglide, Prestomatic, Tip-toe Hydraulic, and Ultramatic.
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3240 lbs.

If passenger automobile, ambulance, hearse, house trailer, or station wagon, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.)

Arrears { Tax _____ Fees _____
1953 Tax 16.40
1953 Fees _____
Total _____

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. X _____
(Owner must sign on above line opposite X)

Northwestern Stat[illegible] Portland Cement Co
(Print or type name here)

14. _____ Rice
(County of Residence)

15. 516 3rd St SW
Postoffice Address (Street or R.F.D.)

Owatonna Minn
(City) (P.O. Zone) (State)

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____, 195_

SEAL

Notary Public _____ County, Minn.

My commission expires _____

1-10

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fols. 405, 405a]

PLAINTIFF'S EXHIBIT BB

United States of America.

STATE OF MINNESOTA

36825

DEPARTMENT OF STATE

I, MRS. MIKE HOLM, Secretary of State of the State of Minnesota, do hereby certify that the annexed is a full, true and correct photocopy of Application for Registration dated November 1, 1948 in the name of Northwestern States Portland Cement Company, 516 S. W. Third Street, Faribault, Minnesota, covering a 1946 Fleetmaster Sport Sedan with serial number 21DKJ13841, motor number DAA366929, 1949 registration number 176160.

Application for Registration dated November 2, 1949 in the name of Northwestern States Portland Cement Company, 516 S. W. Third Street, Faribault, Minnesota, covering same vehicle, 1950 registration number 176528.

Application for Registration dated November 8, 1950 in the name of Northwestern States Portland Cement Company, 516 - 3rd Street S. W., Faribault, Minnesota, covering same vehicle, 1951 registration number 177710.

Application for Registration dated November 3, 1951 in the name of Northwestern States Portland Cement Company, 516 - 3rd Street S. W., Faribault, Minnesota, covering same vehicle, 1952 registration number 176886.

as the same appears of record in this office, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol in St. Paul, this 29th *day of* October,

A. D. 19 54.

Secretary of State

405

Posting of transfers on reverse side of application covering same vehicle showing continuity of ownership to Lockwood Auto Company, 515 Central Avenue, Faribault, Minnesota; and to Earnest P. Reichert, Route # 5, Faribault, Minnesota, under date of March 13, 1952.

405a

386

[fol. 406]

FORM 1H

APPLICATION FOR MOTOR VEHICLE REGISTRATION
USE THIS SIDE ONLY TO RE-REGISTER A VEHICLE REGISTERED IN MINNESOTA LAST YEAR

For new vehicle or one registered elsewhere use other side.

AUTOMOBILE—~~HEARSE—SCHOOL BUS~~ (Cross out two)

To MIKE HOLM, Secretary of State

St. Paul, Minnesota

Date Nov. 14 1948

Do not write in this space. 41

76-160

RECD

Here Attach Cashier's Check or Money Order.

Attach Registration Certificate Here.

If not attached, explain why.

Do not Write in This Space. For Office Use Only.

Give 1948 Minnesota Registration No.

No. 176-241

Make Chev.

Motor Da93669294

Serial 2102KJ.13841

Year & Model 1946 FLM.

Type Sft. Sedan

SHIPPING WEIGHT
(As shown on registration card)

3200 lbs.

If shipping weight is not available attach official weight ticket.

Manufacturer's Shipping Weight	TAX IN ALL MAKES							
	All 1949 Models	All 1948 Models	All 1947 Models	All 1946 Models	All 1945 Models	All 1944 Models	All 1943 Models	All Older Models
Under 2,000 lbs.	$11.00	$ 9.00	$ 8.25	$ 6.60	$ 5.00	$ 5.00	$ 5.00	$ 5.00
2,000-2,200 lbs., Inc.	17.00	15.30	12.75	10.20	7.65	7.50	7.50	7.50
2,201-2,400 " "	18.00	16.20	13.50	10.80	8.10	7.50	7.50	7.50
2,401-2,600 " "	19.00	17.10	14.25	11.40	8.55	7.50	7.50	7.50
2,601-2,800 " "	20.00	18.00	15.00	12.00	9.00	7.50	7.50	7.50
2,801-3,000 " "	21.00	18.90	15.75	12.60	9.45	7.50	7.50	7.50
3,001-3,200 " "	22.25	20.02	16.69	13.35	10.01	7.50	7.50	7.50
3,201-3,400 " "	25.50	22.95	19.13	15.30	11.48	7.65	7.50	7.50
3,401-3,600 " "	27.25	24.53	20.44	16.35	12.26	8.18	7.50	7.50
3,601-3,800 " "	30.75	27.68	23.06	18.45	13.84	9.23	7.50	7.50
3,801-4,000 " "	34.75	31.28	26.06	20.85	15.64	10.43	7.50	7.50
4,001-4,200 " "	45.00	40.50	33.75	27.00	20.25	13.50	7.50	7.50
4,201-4,400 " "	54.00	48.60	40.50	32.40	24.30	16.20	8.10	7.50
4,401-4,600 " "	57.00	51.30	42.75	34.20	25.65	17.10	8.55	7.50
4,601-4,800 " "	65.00	58.50	48.75	39.00	29.25	19.50	9.75	7.50
4,801 and over	75.00	67.50	56.25	45.00	33.75	22.50	11.25	7.50

If VEHICLE IS A BUS is it operated ONLY as a School Bus _____?

(If not, this blank will not serve. Use Bus Form 5A)

ARREARS { Tax _____ Fees _____

1949 Tax 13.35

1949 Fees _____

Total 13.35

I, the undersigned, hereby apply for registration and affirm that I am the owner of the above described vehicle, and also that I have described it correctly.

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

OWNER X Northwestern States Portland Cement Co. By Office Manager (Corporation) Northwestern States Portland Cement Co. (Print or type name here)

(Owner must sign here)

I RESIDE IN THE COUNTY OF Faribault, Minnesota

I GET MY MAIL AT 516- 3rd St. W.

Postoffice Address (Street or R F D) City P. O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R F D) City P. O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

Please do not write on this check and personal checks

(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

426

[fol. 407]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

IMPORTANT: Before filling out application, read other side.

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 21 and 22 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-19 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 20 on reverse side in addition.

176-528
REC'D 10

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

Here Attach Draft—Cashier's Check or Money Order.

Do Not Write in This Space. For Office Use Only.

STATE OF MINNESOTA
County of Rice } ss. **Date** 11/2/ **19**49

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1949 Minnesota Registration No.
No. 176160.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

Have you read the law on the reverse side hereof in regard to that class? ____

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE":** CLASS ____
   Encircle the one you are registering.
   Tax: Find it by weight, table below.
2. **"HOUSE TRAILER":** CLASS "HZ" ____
   Tax: Find it by weight, see table below.
3. **"PASSENGER CAR UTILITY TRAILER":** CLASS "$Z" ____
   Tax: $2 per biennium, $1 for last year thereof.
   (This is new. See law on other side.)
4. **"SNOWMOBILE":** CLASS "S" ____
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.
5. **"MOTORCYCLE":** CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
6. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER":** CLASS "MBS" ____
   Encircle the one you are registering, Tax: $1.

Attach Registration Certificate Here If not attached, explain why.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1950 1949 1948	1947 1946 1945	1944 1943 1942	1941 to 1932	1931 and older
Under 2000	$15.20	$15.00	$12.50	$10.00	$ 7.50	3601-3800	$23.50	$24.38	$16.88	$10.00	$ 8.25
2000-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.30	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

7. **MAKE** Chev.
8. **SERIAL NO.** 21DKJ 13841
9. **MOTOR NO.** DAA366929
10. **YEAR & MODEL** 1946 Fleet
11. **TYPE** Spl Sed
12. **No. of Cyl.** ____ **Pass. Cap.** ____

Weight 3200 **lbs.**
If passenger automobile, ambulance, hearse, house trailer or snowmobile, give manufacturers shipping weight. (If shipping weight is not available, attach official weight ticket.) For a trailer other than a house trailer, give maximum load carried at any one time.

ARREARS Tax ____ Fees ____
1950 Tax 18.60
1950 Fees ____
Total ____

Please do send personal check
(SEE INST. ONS ON REVERSE SIDE HEREOF)

I understand that any plate issued to me hereon may be seized at any time, if I do not respond promptly to request for proof of title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. **OWNER** X Nat'l Gypsum-Golden State-Portland Cement Co (NORTHWESTERN States PORTLAND CEMENT Co)
Owner must sign here (Print or type name here)

14. **I RESIDE IN THE COUNTY OF** Rice

15. **I GET MY MAIL AT** Faribault, Minn.
Postoffice Address (Street or R.F.D.) City P. O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ **day of** ____ **19**____

Notary Public ____, **County, Minn. My commission expires** ____

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

388

[fol. 408]

Form AA

Here Attach Draft, Cashier's Check or Money Order.

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Do Not Write in This Space

171-

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA
County of Rice } ss. Date 11/8, 195[illegible]

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

Give 1950 Minnesota Registration No.
176-528
If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. **"PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS** ✓
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.

2. **"HOUSE TRAILER": CLASS "HZ"** ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1951 1950 1949	1948 1947 1946	1945 1944 1943	1942 to 1933	1932 and older
Under 2000	$15.50	$15.00	$12.50	$10.00	$ 7.50	3501-3800	$33.30	$24.98	$16.65	$10.00	$ 5.31
2000-2200	16.00	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.00	38.70	25.50	12.90	12.90
2601-2800	21.00	16.30	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75
3401-3600	28.00	21.00	14.00	10.00	7.50						

3. **"PASSENGER CAR UTILITY TRAILER": CLASS "$Z"** ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1951).

4. **"MOTORCYCLE": CLASS "MC"** ____
   Does it have a side car or three wheels? _____
   Tax: Without side car $3, with side car or 3 wheels $5.

5. **"MOTORIZED BICYCLE" OR "MOTOR SCOOTER": CLASS "MBS"** ____
   Encircle the one you are registering. Tax: $1.

6. **"SNOWMOBILE": CLASS "S"** ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

7. MAKE Chev.
8. SERIAL NO. 2HKG-13841
9. YEAR & MODEL 46-
10. TYPE Hwy Pat Sed.
11. Check kind of transmission:
    Standard ☐ Other ☐
12. No. of Cyl. _____ Pass. Cap. _____

Weight 3200 lbs.

If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "$Z" trailer give gross weight of load and vehicle.

ARREARS { Tax _____ Fees _____
1951 Tax 8.60
1951 Fees _____
Total _____

Attach Registration Certificate Here. If not attached, explain why.

Please do not ✓ personal check
(SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

I understand that any plate issued to me hereon may be seized at any time, if I do not [illegible] promptly or register for proper class or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Northwestern States Portland Cement Co (Print or type name here)
    Owner must sign here
    Northwestern States Portland Cement Co

14. I RESIDE IN THE COUNTY OF Rice

15. I GET MY MAIL AT 516 3rd St W Faribault Minn
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this _____ day of _____, 195__

Notary Public _____ County, Minn. My commission expires _____

If plates are not to be sent to owner as above give name and address here _____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1.

[fol. 409]

Form AA

APPLICATION FOR MOTOR VEHICLE REGISTRATION

For a class not listed hereon use other form where it is listed, form "TK" or "U"

To reregister a vehicle registered in Minnesota last year answer items 7-15. To register a new vehicle answer items 7-15 on this side and 22-24 on reverse side in addition. To register a used vehicle from another state, answer items 7-15 on this side and 16-20 on reverse side in addition. To register a home-made vehicle answer items 7-15 on this side and item 21 on reverse side in addition.

Here Attach Draft, Cashier's Check or Money Order.

176-886

Do not write in this space

To MIKE HOLM, Secretary of State,
St. Paul, Minnesota

STATE OF MINNESOTA }
County of Otter Tail } ss. Date 4/3, 1951

Give 1951 Minnesota Registration No.
177-710
If not previously registered in Minnesota, answer items pertinent to your registration on reverse side hereof.

The subscriber hereto being first duly sworn hereby declares that he is the owner of the motor vehicle described herein which is listed for registration and taxation under the laws of the state of Minnesota and that the statements made herein in regard to said vehicle are in all respects true and correct.

CHECK CLASS IN WHICH YOU WISH TO REGISTER:

I have read the definitions carefully and will use the vehicle only as the law allows in the class selected.

1. "PASSENGER AUTOMOBILE, AMBULANCE, HEARSE": CLASS ____
   "Passenger automobile" means any motor vehicle designed and used for the carrying of not more than eight persons, including station wagons.
   Encircle above the one you are registering. Tax table below.
2. "HOUSE TRAILER": CLASS "HZ" ____
   "House trailer" means any trailer or semi-trailer designed and used for human living quarters, and does not include bunk houses, so-called.
   Tax: Find it by weight, table below.

PASSENGER AUTOMOBILE AND HOUSE TRAILER TAX TABLE

Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older	Mfgs. Shipping Weight in lbs.	ALL MODELS 1952 1951 1950	1949 1948 1947	1946 1945 1944	1943 to 1934	1933 and older
Under 801	$ 5.00	$ 5.00	$ 5.00	$ 5.00	$ 5.00	3401-3600	$28.00	$21.00	$14.00	$10.00	$ 7.50
801-2000	15.20	15.00	12.50	10.00	7.50	3601-3800	33.30	24.98	16.65	10.00	8.33
2001-2200	16.80	15.00	12.50	10.00	7.50	3801-4000	39.00	29.25	19.50	10.00	9.75
2201-2400	18.40	15.00	12.50	10.00	7.50	4001-4200	45.10	33.83	22.55	11.28	11.28
2401-2600	20.00	15.00	12.50	10.00	7.50	4201-4400	51.60	38.70	25.80	12.90	12.90
2601-2800	21.60	16.20	12.50	10.00	7.50	4401-4600	58.50	43.88	29.25	14.63	14.63
2801-3000	23.20	17.40	12.50	10.00	7.50	4601-4800	65.80	49.35	32.90	16.45	16.45
3001-3200	24.80	18.60	12.50	10.00	7.50	4801-5000	73.50	55.13	36.75	18.38	18.38
3201-3400	26.40	19.80	13.20	10.00	7.50	Over 5000	75.00	56.25	37.50	18.75	18.75

7. MAKE Chev
8. SERIAL NO. 2HKJ13841
9. YEAR & MODEL 46
10. TYPE Spt. Sed
11. Check kind of transmission: Standard ☑ Other ☐
12. No. of Cyl. 6 Pass. Cap. 5

Weight 3200 lbs.
If passenger automobile, ambulance, hearse, house trailer, station wagon or snowmobile, give manufacturer's shipping weight. (If shipping weight is not available, attach official weight ticket.) For a "HZ" trailer give gross weight of load and vehicle.

3. "PASSENGER CAR UTILITY TRAILER": CLASS "SZ" ____
   Trailers of not more than two wheels with a gross weight of load and vehicle not exceeding 3000 pounds, not for hire and used only by the owner thereof with passenger automobiles and not employed in the transportation of passengers or property for hire.
   Tax: $2 per biennium, $1 for last year thereof (1953).
4. "MOTORCYCLE": CLASS "MC" ____
   Does it have a side car or three wheels? ____
   Tax: Without side car $3, with side car or 3 wheels $5.
5. "MOTOR SCOOTER," "MOTORIZED BICYCLE" OR "MOTORIZED WHEEL CHAIR": CLASS "MBS" ____
   Encircle the one you are registering. Tax: $1.
6. "SNOWMOBILE": CLASS "S" ____
   Motor vehicles specially equipped for operation over snow and used exclusively for such purpose.
   Tax: $3 if weighing one ton or less, and an additional $2 for each additional ton or fraction thereof.

ARREARS Tax ____ Fees ____
1952 Tax 12.50
1951 Fees ____
TRANSFER

I understand that any plate issued to me hereon may be seized at any time, if I do not surrender promptly to request for plate or title or additional payment of tax or fee that may be discovered to be necessary when this application is checked at St. Paul.

13. OWNER X Herb Peterson Sr. (Print or type name here)
    Owner must sign here
14. I RESIDE IN THE COUNTY OF Pennington
15. I GET MY MAIL AT 576 - 3rd St Bal Parthaut Minnesota
    Postoffice Address (Street or R.F.D.) City P.O. Zone State

CERTIFICATE will be sent to this address; be sure it is clear.

Attach Registration Certificate Here. If not attached, explain why.

Please do not send personal check (SEE INSTRUCTIONS ON REVERSE SIDE HEREOF)

SEAL

ACKNOWLEDGMENT not necessary if this vehicle was registered in MINNESOTA last year by the present applicant.

Subscribed and sworn to before me this ____ day of ____, 195

Notary Public ____ County, Minn. My commission expires ____

If plates are not to be sent to owner as above give name and address here ____

Postoffice Address (Street or R.F.D.) City P.O. Zone State

NOVEMBER 15 LAST DAY TO REGISTER WITHOUT EXTRA FEE. NEW YEAR PLATES MUST BE ON VEHICLES JANUARY 1

Please do not send personal check

DO NOT SEND CURRENCY. If you do, it will be at your own risk. Remit by certified check, American Express or U. S. Postal money order, or bank draft. To avoid delay, do not send personal checks. Applications with which personal checks are submitted will be held up for 13 days after deposit, for it sometimes takes that long to get reports on checks that do not clear. Send SEPARATE CHECKS for EACH APPLICATION to avoid return of application. Especially when more than one application is forwarded in the same envelope, it is well to put the old registration number or applicant's name on check or draft so as to be sure that it will be connected with the right application.

Do Not Write in This Space. For Office Use Only.

To Register a Used Vehicle from Another State Attach the Title and Registration Certificate and Give the Following Information:

16. State _____ Registration No. _____ Year _____ 17. When was this vehicle first brought to Minnesota? _____ 18. Did you come intending to remain here permanently? _____ If not, when did you decide to remain permanently? _____ (Date) Up to the time you decided to remain here permanently did you consider yourself a resident of the state in which your vehicle is now registered? _____ (Date) 19. Was this vehicle ever registered before in Minnesota? _____ When? _____ Under what No.? _____ If registered previously in Minnesota, was it removed with intent that removal would be permanent? _____ When? _____

20. Are you now employed in Minnesota? _____ If so, have you been, or do you expect to be, on the same job for six months or more? _____ When did you start? _____ (Date)

To Register a Home Made Passenger Car Utility Trailer, Motorcycle, Motor Bicycle, or Motor Scooter, Give the Following Information:

21. Give date completed _____, and date first used on highways _____

To Register a New Vehicle, Give the Following Information:

22. From whom purchased _____

_____ 23. Date purchased _____, 195__
City State

24. If a new vehicle purchased in another state, when was it first brought to Minnesota? _____

DEALER'S REPORT OF SALE

(Required only for a new vehicle)

STATE OF MINNESOTA
County of _____ } ss.

_____ being duly sworn says: That he is authorized to sign as agent for _____, licensed dealer for _____ (Year) under No. _____; that said licensed dealer on _____ (Date), sold the vehicle described in the application for registration on obverse side to the applicant who signed the application as owner; that the vehicle came into the possession of said dealer from

_____ (Whom) _____ (Address)

_____ (When) by _____ (Give name of railroad, licensed drive-a-way contractor or the license number of dealer's plates used)

that since that time it has been held for sale by the said dealer; that it was not used so as to become subject to tax in Minnesota while in the possession of said dealer nor before; that ALL the tax and penalties due under the law is hereby waived in this application for registration.

Signature _____

Subscribed and sworn to before me this _____ day of _____, 195__

SEAL.

_____

Notary Public _____ County, Minn. My commission expires _____

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~703~~ 33

T. V. WILLIAMS, AS STATE REVENUE COMMISSIONER, PETITIONER,

vs.

STOCKHAM VALVES AND FITTINGS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1958
CERTIORARI GRANTED MARCH 17, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 763

T. V. WILLIAMS, AS STATE REVENUE COMMISSIONER, PETITIONER,

vs.

STOCKHAM VALVES AND FITTINGS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 30, 1958

[fol. 1]

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

Bill of Exceptions—Filed July 24, 1957

Georgia, Fulton County.

Be It Remembered that on the 17th day of July, 1957, at the July term, 1957, of Fulton Superior Court, before the Honorable Claude D. Shaw, Judge of said Court, then and there presiding, there came on to be tried the case of Stockham Valves & Fittings, Inc., plaintiff, vs. T. V. Williams, as State Revenue Commissioner of the State of Georgia, defendant, being case No. A-55986 in said Court, the same being a suit for refund of taxes alleged by said plaintiff to have been illegally collected from it by the defendant under the Georgia Income Tax Act of 1931, as amended.

Be It Further Remembered that the parties, by written stipulation and agreement, duly filed before said trial, waived a jury trial and consented and agreed that said case be submitted to said Judge without a jury, and for said case and all issues of law and fact therein to be heard and determined by said Judge upon the agreed facts recited in said stipulation, the same constituting all of the evidence in said case.

Said stipulation and agreed facts, omitting the caption and entry of filing, is as follows:

[fol. 2]

IN THE SUPERIOR COURT OF FULTON COUNTY

STIPULATION OF FACTS—July 15, 1957

It is hereby stipulated by and between the parties acting through counsel of record for plaintiff and for defendant in the above styled case that the facts hereinafter set forth shall be accepted as true on the trial of said case without the necessity of introducing any further evidence with respect thereto. This stipulation, however, shall not be

taken to admit the relevancy of the facts hereafter set forth.

1. Plaintiff, Stockham Valves and Fittings, Inc., hereafter referred to as Stockham, is, and was for the calendar years 1952, 1954 and 1955, a Delaware corporation with its principal or home office and its manufacturing plant located in Birmingham, Alabama.

2. Defendant, hereinafter referred to as Commissioner, on April 16, 1953, collected from Stockham the sum of $18.73 as income taxes claimed to be due the State of Georgia for the calendar year 1952.

3. Commissioner, on March 14, 1955, collected from Stockham the sum of $175.00, and on June 9, 1955, the further sum of $314.48, making a total of $489.48, as income taxes claimed to be due the State of Georgia for the calendar year 1954.

4. Commissioner, on April 9, 1956, collected from Stockham the sum of $970.10 as income taxes claimed to be due the State of Georgia for the calendar year 1955.

[fol. 3] 5. On April 9, 1956, Stockham duly filed with Commissioner claims for refund for the aforesaid amounts, and these claims for refund were denied by Commissioner on April 23, 1956.

6. The amounts of the income taxes claimed to be due the State of Georgia and collected by Commissioner as aforesaid, for each of the calendar years indicated, are not in dispute; this is to say that the correctness of the figures used in computing these amounts are conceded by Stockham, but it denies liability therefor.

7. Stockham, since 1905, and including the tax years in question, has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of the valves and pipe fittings which it manufactured. As stated, its home office and its manufacturing plant were located in Birmingham, Alabama. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham,

Alabama, Philadelphia, Pennsylvania, Chicago, Illinois, Houston, Texas, and Vernon, California. It maintained established sales service offices at the above locations and also at Cambridge, Massachusetts, New York, New York, Atlanta, Georgia, Pittsburgh, Pennsylvania, San Francisco, California, Washington, D. C., Dallas, Texas, and St. Louis, Missouri. Purchasers of Stockham's valves and pipe fittings were located in all of the United States.

8. The valves and pipe fittings manufactured by Stockham were not of a patented or peculiar design, but were of a standard or common design manufactured and sold throughout the United States by a number of competitors. While not disregarding price as a factor, Stockham sought, in this competition, to emphasize the quality of Stockham products, its good service to local wholesalers and jobbers handling Stockham products, and the development of local demand for Stockham products through sales work among local architects, engineers, contractors and others consulted and in a position to advise concerning the specifying [fol. 4] and use of valves and pipe fittings, including representatives of governmental and industrial users. Stockham did no substantial advertising through national advertising media, but it relied for the most part on its reputation acquired over the years in respect of its products and service and on the personal efforts of its sales representatives stationed in established sales service offices as aforesaid.

9. As a matter of policy and practice during the tax years in question, Stockham made sales only to established local wholesalers and jobbers, and (except for sales to makers of automatic sprinkler systems) made no sales directly to users and installers of valves and pipe fittings. The local wholesalers and jobbers who handled Stockham products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangement, to the distribution of Stockham products. Any established local wholesaler or jobber, having established credit, was considered as a prospective customer and could buy from Stockham. Established local wholesalers and jobbers who did buy from

Stockham were entirely free to discontinue buying from Stockham at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

10. Stockham, during the years in question, made no sales on a consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession which was not available to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

11. All orders for Stockham products were contractually accepted or rejected at the home office of Stockham in Birmingham, Alabama. No representative of the com-
[fol. 5] pany at any sales service office had any authority to, or did, contractually accept or reject any order under any circumstances; the form used by sales representatives expressly so stated. The home office of the company was in teletype communication at all times with each of its sales service offices and with each of its warehouses. Contractual authority and shipping authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the company's home office in Birmingham, directly from local wholesalers and jobbers. Such orders as were received at sales service offices, or by the solicitation of sales representatives working out of sales service offices, were relayed by mail, telephone, or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

12. The company's home office at Birmingham communicated directly with local wholesalers and jobbers who had ordered its products in matters of confirmation, credit, collections, routings, shipping dates and other matters

incident to completing transactions to the satisfaction of the parties. Copies of all communications from the home office to a customer were sent to the sales service office serving the territory in which the customer was located so that the Stockham representative there would at all times be apprised of the situation respecting such customer. All sales were made on an "f.o.b. warehouse" basis and were completed there by deliveries to customers or to common carriers consigned to customers.

13. Beginning in 1950 and during the tax years in question, Stockham, in conformity with the policies and practices above, rented and maintained an established sales service office in Atlanta serving a territory comprising Georgia, North Carolina, South Carolina, and parts of Tennessee and Virgina. (sic) Part of Florida was also included in the territory until January 1954. This office was publicly identified as the office of Stockham. The [fol. 6] telephone at this office was listed in the Atlanta telephone directories under the name of Stockham in both the alphabetical and classified business listings. This office was listed in the name of Stockham in Atlanta city directories. The company, on its sales service office letterheads, in its catalogues, discount sheets and on some sales promotional material, listed the fact that it maintained a sales service office in Atlanta.

14. Several competitors of Stockham maintained warehouse stocks of competing products in Atlanta. Through local wholesalers and jobbers who carried local inventories of its products, and through its established sales service office in Atlanta, in direct teletype communication with its home office in Birmingham, and overnight delivery service from Birmingham, Stockham sought to allay its competitors' advantage in this respect.

15. Since 1950, and during the tax years in question, Stockham employed on a regular and full-time basis a woman secretary at the sales office in Atlanta. This secretary functioned, on the basis of her own knowledge and experience and literature furnished by the company, as a source of information concerning Stockham products. She performed stenographic and clerical duties and facilitated

communications between the Stockham home office in Birmingham, Stockham's sales representative when he was out in the territory served by the Atlanta office, and customers, prospective customers, contractors and users of valves and pipe fittings. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers and other people interested in Stockham products.

16. Since 1950, and during the tax years in question, Stockham employed on a regular and full-time basis a sales representative whose established office was the sales service office in Atlanta and who traveled the territory served by the Atlanta office. Approximately one-third of his normal working time was spent traveling within Georgia and in the Atlanta sales service office. Approximately two-thirds of his normal working time was spent [fol. 7] traveling outside of Georgia. This sales representative was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office. In general, the activity of this sales representative was to do everything prompted by his own judgment, training and ability, within the policies and practices of the company, to promote the sale, specifying, ordering and use of Stockham products within the territory served by the Atlanta office.

17. The Atlanta sales representative, as one phase of his activities during the tax years in question, made personal and other calls upon architects, engineers and contractors who were in a position to counsel and advise with respect to specifying and ordering valves and pipe fittings for installation and use. He also made calls upon representatives of governmental and industrial users of valves and pipe fittings for the same purpose. The sales representative did all he could as opportunities presented themselves in this work to demonstrate the superior quality of Stockham products and services. He supplied sales literature and invited technical inquiries concerning technical problems involved in the installation and use of valves and pipe fittings. He solicited no orders from these persons, but informed them of the various local wholesalers

and jobbers through whom the Stockham products could be obtained. He pointed out that orders would be promptly filled by such wholesalers and jobbers either from their local stocks or by means of the prompt service available to them through Stockham's established sales service office in Atlanta and overnight delivery service from Birmingham.

18. The Atlanta sales representative, as another phase of his activities during the tax years in question, called on local wholesalers and jobbers who were buying and handling Stockham products. He did all he could as opportunities presented themselves to check stock needs, to express appreciation for past patronage, to encourage further orders, to supply advertising literature, to promote the idea of the good service available through the estab- [fol. 8] lished sales service office in Atlanta and the overnight delivery service from Birmingham, to keep the local wholesalers and jobbers aware of the work continuously being done to develop a demand for Stockham products, and otherwise to get information and leads that might be developed into more business. If the sales representative received an order, he would relay it to the home office by mail, telephone, or teletype, depending upon its urgency, where such order would be accepted or rejected. Where orders had been previously mailed directly to the home office and were yet undelivered, he undertook to expedite their shipment or to explain their delay.

19. The Atlanta sales representative, as another phase of his activities during the tax years in question, called on established local wholesalers and jobbers who were not buying and handling Stockham products, that is, prospective customers. The sales representative did all he could, as opportunities presented themselves, to demonstrate the superior quality of Stockham products, to promote the idea of the good service available through the established sales service office in Atlanta and the overnight delivery service from Birmingham, and to make the prospective customer aware of the work continuously being done to develop a demand for Stockham products.

20. The Atlanta sales representative was responsible to Stockham's divisional or district sales manager, who

were both located in Birmingham, Alabama. In carrying out the day-to-day activities described in paragraphs 17, 18 and 19 hereof, the sales representative ordinarily operated according to his best judgment and initiative and made such reports as he thought necessary. All of his activities were, however, carried on within the framework of his training with the company and the specific instructions and rules which were issued from time to time by the divisional or district sales manager. He kept the sales manager informed at all times of his whereabouts. The Atlanta sales representative had no authority, nor did he accept any order, bind plaintiff to furnish goods, arrange credit terms or make collections.

[fol. 9] 21. Users of Stockham products occasionally complained that products furnished them were defective in material or workmanship. Such complaints were either called to the attention of the Atlanta sales representative or plaintiff's Birmingham office by the wholesale customer who sold the products. In such cases, the Atlanta sales representative, usually in company with the wholesaler who sold the products, would investigate the alleged defective products and make a report to the Birmingham office. If the complaint was of a serious nature, the chief inspector from the Birmingham office would ordinarily be sent over to assist the sales representative. Stockham considered it important that complaints be handled expeditiously and effectively. In all cases of a complaint, the Atlanta sales representative was required to file a written report with the home office. Replacements of defective products were usually made from the wholesaler's stock at the direction of Stockham and at Stockham's expense. On some occasions the sales representative picked up defective parts and forwarded them to Birmingham for replacement.

22. At no time during the tax years in question did Stockham qualify to do business within the State of Georgia; no officer or director of Stockham was a resident of Georgia; the Atlanta sales representative was a resident of Georgia. The only property owned by Stockham located in Georgia was a small amount of office furniture, equipment, supplies and advertising literature kept at its Atlanta sales service office. The value of this property

was approximately $1,000.00, and its only use was in connection with the activities of the Atlanta office as hereinbefore described. During the tax years in question, rent, salaries and all other expenses of the Atlanta office were paid by checks drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of Stockham in Georgia had authority, either alone or with any other person, to draw checks upon or make withdrawals from, any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office where [fol. 10] they were reviewed and paid by checks. Stockham kept no bank account in the State of Georgia. All credit matters were handled at plaintiff's Alabama office where credit information was obtained and all credit questions passed on. All invoices were prepared and mailed from and all collections were made by plaintiff's office in Alabama.

23. For the tax year 1952, the $18.73 collected from Stockham by Commissioner as income taxes claimed to be due the State of Georgia was computed as follows:

Net business income subject to apprortionment (sic)		$3,735,710.96
Finished goods inventory under 92-3113(4)(a):		
Within Georgia	$ -0-	
Total	3,669,644.19	
Ratio		.0
Wages and salaries under 92-3113(4)(b):		
Within Georgia	10,386.84	
Total	5,652,378.61	
Ratio		.00183760
Gross receipts under 92-3113(4)(c):		
Within Georgia	155,373.62	
Total	14,541,301.54	
Ratio		.01068498
Average ratio		.00417419

Net business income apportioned to Georgia		$ 16,633.78
Less Federal income tax apportioned		15,648.02
Net income before contributions		985.76
Contributions		49.29
Net taxable income		936.47
Tax thereon @ 2%		18.73

[fol. 11] 24. For the tax year 1954, the $489.48 collected from Stockham by Commissioner as income taxes claimed to be due the State of Georgia was computed as follows:

Net business income subject to apportionment		$2,859,243.09
Finished goods inventory under 92-3113(4)(a):		
Within Georgia	-0-	
Total	$ 3,991,289.23	
Ratio		.0
Wages and salaries under 92-3113(4)(b):		
Within Georgia	11,307.60	
Total	5,907,469.19	
Ratio		.00191412
Gross receipts under 92-3113(4)(c):		
Within Georgia	163,617.88	
Total	13,964,557.32	
Ratio		.01171665
Average ratio		.00454359
Net business income apportioned to Georgia		$ 12,991.23
Less Federal income tax apportioned		3,626.88
Net income before contributions		9,364.35
Contributions		464.66
Net Taxable income		8,899.69
Tax thereon @ 5½%		489.48

25. For the tax year 1955, the $970.10 collected from Stockham by Commissioner as income taxes claimed to be due the State of Georgia was computed as follows:

Net business income subject to apportionment		$3,655,985.15
Finished goods inventory under 92-3113(4)(a):		
Within Georgia	$ -0-	
Total	5,203,309.71	
Ratio		.0
Wages and salaries under 92-3113(4)(b):		
Within Georgia	14,525.66	
Total	6,346,426.01	
Ratio		.002289

[fol. 12]

Gross receipts under 92-3113(4)(c):		
Within Georgia	$ 294,162.90	
Total	15,872,282.90	
Ratio		.018533
Average ratio		.006941
Net business income apportioned to Georgia		$ 25,376.19
Contributions		1,123.60
Net taxable income		24,252.59
Tax thereon @ 4%		970.10

26. During the years 1952, 1954 and 1955, Stockham paid net income taxes to the following states in the years and amounts indicated and to no others (except Georgia):

Alabama

1952	$ 39,795.08
1954	30,692.59
1955	39,439.48

California

1952	$ 7,675.65
1954	8,431.61
1955	8,335.63

Pennsylvania

1952	$ 3,712.35
1954	3,464.65
1955	4,409.72

27. Stockham paid a franchise tax measured by net income to the District of Columbia as follows:

1952	$ 1,782.84
1954	2,203.81
1955	1,462.07

During the years 1952, 1954 and 1955 Stockham did not pay a franchise tax measured by net income to any other state.

[fol. 13] 28. The ratio of Stockham's net profit to its total gross sales for each of the tax years in question was as follows:

1952	10.2%
1954	9.2%
1955	9.6%

29. For the tax years 1952, 1954, and 1955, the total gross sales derived from the territory served by the Atlanta sales office were as follows:

1952	$811,625.40
1954	397,788.38
1955	555,480.05

30. For the tax years 1952, 1954, and 1955, the total gross receipts within Georgia were:

1952	$155,373.62
1954	163,617.88
1955	294,162.90

It is further stipulated between the parties that the Honorable Claude D. Shaw, Judge of the Superior Court, Atlanta Judicial Circuit, may pass upon all issues of law and fact without the intervention of a jury and render judgment thereon and that this stipulation shall be received by the Court as all the evidence in this case and be made a part of the record in this case.

This 15th day of July, 1957..

John Izard, Jr., W. K. Meadow, Attorneys for Plaintiff.

Spalding, Sibley, Troutman, Meadow & Smith, 434 Trust Co. of Ga. Bldg., Atlanta 3, Georgia.

Eugene Cook, William L. Norton, Jr., Ben F. Johnson, Jr., Attorneys for Defendant.

[fol. 14]

IN THE SUPERIOR COURT OF FULTON COUNTY

JUDGMENT—July 19, 1957

This case came on for trial at the July Term, 1957, of this Court. Counsel John Izard, Jr. and W. K. Meadow appeared for plaintiff, and Assistant Attorneys General William L. Norton, Jr., and Ben F. Johnson, Jr., appeared for defendant. A stipulation was filed in which it was agreed that this Court should pass on all issues of law and fact without the intervention of a jury and that the facts set forth therein should be received by the Court as all the evidence in the case. After consideration of the facts as stipulated and after hearing oral argument of Counsel for both parties,

It Is Hereby Found, Ordered and Adjudged that plaintiff, during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113, as amended by an Act approved February 16, 1950 (Ga. Laws 1950, pp. 299-303); that the taxes collected by defendant from plaintiff under Code Section 92-3102, being taxes on plaintiff's net income fairly apportioned according

to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of Due Process under the Federal Constitution, as alleged by plaintiff's petition; that the [fol. 15] aforesaid Code Section 92-3113, as specified by plaintiff's petition, is not unconstitutional for any of the reasons assigned in plaintiff's petition; that said taxes were not erroneously or illegally collected by defendant from plaintiff; that plaintiff is not entitled to any recovery against defendant; that judgment be for defendant; and that the costs of the action be cast against plaintiff.

In open Court this 19 day of July, 1957.

/s/ Claude D. Shaw, Judge, Fulton Superior Court.

IN THE SUPERIOR COURT OF FULTON COUNTY

ASSIGNMENTS OF ERROR

Said judgment was adverse to and contrary to the contentions of the plaintiff in error, Stockham Valves & Fittings, Inc., and it then and there excepted and here and now excepts to said judgment and assigns the same as error and as contrary to law and contrary to the evidence, and says that the Court erred in entering said judgment and in not entering a judgment in favor of plaintiff in error for the full amount claimed by it, upon the following grounds, to wit:

1. Plaintiff in error says that the Court erred, as a matter of law, in entering said judgment, because the collection of said tax, and the portion of the Georgia Income Tax Statute under which said tax was collected, to wit, the first paragraph of Section 92-3113 of the Georgia Code of 1933, as applied to plaintiff in error, under the undisputed facts as agreed to by the parties in the stipulation set out in this bill of exceptions at pages 2 to 13, inclusive, constitutes a burden on and interference with interstate commerce and is, therefore, in violation of the interstate commerce clause of the United States Constitution as set forth in the Georgia Code of 1933, Section 1-125 (3).

[fol. 16] 2. Plaintiff in error further says that the Court erred, as a matter of law, in entering said judgment, because the collection of said tax, and the portion of the Georgia Income Tax Statute under which said tax was collected, to wit, the first paragraph of Section 92-3113 of the 1933 Code of Georgia, as applied to plaintiff in error, under the undisputed facts as agreed to by the parties in the stipulation set out in this bill of exceptions at pages 2 to 13, inclusive, constitutes the taxation of a foreign corporation measured by transactions conducted and concluded entirely without the territorial limits of the State of Georgia and with respect to which no taxable event occurred in the State of Georgia, which is in violation of the due-process clause of the United States Constitution as set forth in the 1933 Code of Georgia, Section 1-815.

3. Plaintiff in error further says that the Court erred, as a matter of law, in entering said judgment, because it denies plaintiff in error the right to recover taxes illegally collected from it on account of income arising from and measured by transactions which were wholly in interstate commerce and, with respect to which, all sales, deliveries, collections and other essential transactions occurred without the State of Georgia, and is, therefore, in violation of the interstate commerce clause of the United States Constitution as set forth in the 1933 Code of Georgia, Section 1-125 (3), and also in violation of the due-process clause of the United States Constitution as set forth in the Georgia Code of 1933, Section 1-815.

4. Plaintiff in error further says that the Court erred, as a matter of law, in entering said judgment for the defendant, for the reason that, under the agreed statement of facts and the undisputed averments in the pleadings, a judgment for plaintiff in error was demanded as a matter of law.

[fol. 17] Plaintiff in error specifies the following portions of the record in this cause, in addition to those set out in this bill of exceptions, as material to a clear understanding of the errors complained of in this bill of exceptions:

1. The petition of the plaintiff, omitting process and return of service;

2. Defendant's answer.

Stockham Valves & Fittings, Inc., the plaintiff in the trial court, names itself herein as the plaintiff in error, and names T. V. Williams, as State Revenue Commissioner of the State of Georgia, the defendant in the trial court, as the defendant in error herein.

And now, within the time provided by law, comes Stockham Valves & Fittings, Inc., plaintiff in error, and tenders this its bill of exceptions and prays that the same may be certified as provided by law and transmitted to the Supreme Court of Georgia, in order that the alleged errors may be considered and corrected.

The Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction of this bill of exceptions, for the reason that the same involves the constitutionality of a statute of the State of Georgia.

Plaintiff in error tenders this bill of exceptions on this the 24th day of July, 1957.

John Izard, Jr., William K. Meadow, Spalding, Sibley, Troutman, Meadow & Smith, Attorneys for Plaintiff in Error.

Post Office Address: 434 Trust Company of Georgia Building, Atlanta, Georgia.

[fol. 20] [File endorsement omitted]

[fol. 22]

IN THE SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed June 14, 1956

The petition of Stockham Valves & Fittings, Inc., herein referred to as plaintiff, respectfully shows:

1.

Plaintiff is, and was at all times hereinafter referred to, a corporation organized and existing under the laws of the State of Delaware.

2.

Plaintiff's principal office and manufacturing plant is located in Birmingham, Alabama.

3.

The defendant herein is T. V. Williams, in his official capacity as State Revenue Commissioner of the State of Georgia.

4.

No officer of plaintiff resides in or maintains his office in the State of Georgia. Plaintiff's chief or highest corporate employee in the State of Georgia during the calendar year 1952 was Hermon E. Warren, Jr. and during the calendar years 1954 and 1955 was Charles L. Burton, each of which employees maintained a sales promotion office in the City of Atlanta, Fulton County, Georgia, which was the only office maintained by plaintiff or any of its employees in the State of Georgia. The Superior Court of Fulton County, Georgia, has jurisdiction of this action.

5.

Defendant, as State Revenue Commissioner, is indebted to plaintiff in the principal sum of $1,478.31, being the amount of income taxes illegally collected by defendant from plaintiff, as herein set out, together with interest on the amounts so collected at the rate of 6% per annum from the date of payment of each such amount, as hereinafter alleged.

6.

On April 16, 1953, defendant collected from plaintiff as income taxes claimed to be due to the State of Georgia for the calendar year 1952 the sum of $18.73. On March 14, 1955, defendant collected from plaintiff the sum of $175.00, and on June 9, 1955, the further sum of $314.48, the total of said sums, to-wit: $489.48, being the amount [fol. 23] of income taxes claimed to be due to the State of Georgia for the calendar year 1954. On April 9, 1956,

defendant collected from plaintiff as income taxes claimed to be due to the State of Georgia for the calendar year 1955 the sum of $970.10. Plaintiff claims interest on each of the amounts herein sued for from the dates of payment, as hereinbefore set out. Defendant claimed the right to collect said sums from the plaintiff under the provisions of the Income Tax Act of Georgia of 1931, as amended. The material portion of said Act, as codified in the 1933 Code at Section 92-3102, levies the following tax upon corporations for the calendar years 1952 and 1954, to-wit:

> "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as is defined in Section 92-3113."

For the calendar year 1955 said Section was amended to levy the following tax on corporations, to-wit:

> "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to four per cent of the net income from property owned or from business done in Georgia, as is defined in Section 92-3113."

7.

Within the time allowed by law, to-wit: on the 9th day of April, 1956, plaintiff filed with the defendant claims for refund covering the income taxes illegally collected as herein alleged.

8.

On April 23, 1956, defendant denied plaintiff's claims for refund and refused to refund to plaintiff the taxes for which claims for refund were made, or any part thereof.

9.

The taxes so collected by the defendant from plaintiff were illegally collected and no part thereof was due and owing by plaintiff for the reasons hereinafter set forth.

[fol. 24]

10.

At all times referred to herein, plaintiff was engaged in the business of manufacturing and selling pipe fittings and valves at its manufacturing plant and principal office in the State of Alabama.

11.

During all times referred to herein, plaintiff derived no income from property owned or business done within the State of Georgia, and plaintiff was not at any such time engaged in any activities within the State of Georgia, except as hereinafter set forth, and was not conducting therein any intrastate or local business whatever.

12.

The only property owned by plaintiff in the State of Georgia during the times mentioned herein was a small amount of office furniture; equipment and supplies kept at its sales promotion office in Fulton County, Georgia. The value of said property was approximately $1,000.00, and no income was derived by plaintiff from any of said property.

13.

At all times mentioned herein, plaintiff was not qualified to do business in the State of Georgia and it carried on no activities in Georgia except as mentioned in the following subparagraphs:

(a) Plaintiff was a corporation organized under the laws of the State of Delaware, having its principal office and its manufacturing plant in Jefferson County, Alabama. All of its corporate records were kept and all of its corporate policies and functions were made and performed at plaintiff's Alabama office and plant.

(b) No officers or directors of plaintiff resided in the State of Georgia, and it had no manufacturing plant, warehouse, storage room, or stock of goods within the State of Georgia.

(c) Plaintiff's only employees in the State of Georgia during the calendar year 1952 were Hermon E. Warren and [fol. 25] Anna Marguerite Freeman. Plaintiff's only employees in the State of Georgia during the calendar year 1954 were Charles L. Burton and Anna Marguerite Freeman. From January 1, 1955, through June 10, 1955, Anna Marguerite Freeman was employed by plaintiff in Georgia; from May 23, 1955, until the end of the calendar year, Sally Hancock was employed by plaintiff in the State of Georgia; and during the entire calendar year 1955, Charles L. Burton was employed by plaintiff in the State of Georgia. Plaintiff had no other employees in the State during the calendar year 1955. Misses Hancock and Freeman's duties were entirely clerical. Messrs. Warren and Burton's duties and activities were to keep in touch with contractors and users of pipe fittings and valves and to furnish technical information about petitioner's products and to encourage the specifying of its products in their orders to wholesalers and jobbers who sell petitioner's valves and fittings. Wholesale dealers and jobbers were the only class of customers in Georgia to whom petitioner made any sales. Messrs. Warren and Burton sought to maintain good will among plaintiff's customers and among the contracting and building trades who used plaintiff's products. None of plaintiff's employees within the State of Georgia had authority to nor did they in fact confirm or accept orders, bind plaintiff to furnish goods, arrange credit terms, make collections, or make final arrangements of any kind with any of plaintiff's customers in the State of Georgia.

(d) Plaintiff rented and maintained a small office in Atlanta, Fulton County, Georgia, for the use of its employees mentioned in the preceding subparagraph and as headquarters for its representative, Mr. Warren or Mr. Burton. The territory covered by these representatives and their duties hereinbefore described covered several southeastern states. The office furniture and equipment kept in said office referred to in paragraph 12 constituted the only tangible property owned by plaintiff in the State of Georgia. Rent, salaries, and all other expenses of the

Atlanta office were paid by checks drawn by officers located at plaintiff's Alabama office on plaintiff's accounts in banks outside the State of Georgia. No employee of plaintiff in [fol. 26] Georgia had authority, either alone or with any other person, to draw checks upon, or make withdrawals from any bank account of plaintiff. Expense accounts of employees at the Atlanta office were forwarded to plaintiff's Alabama office where they were reviewed and paid by checks. Plaintiff kept no bank account in the State of Georgia.

(e) The functions and activities of the employees of plaintiff at its Atlanta office related to the States of Georgia, North Carolina, South Carolina, and parts of Tennessee, Virginia, and Florida, this territory being covered by the Atlanta, Georgia, office of plaintiff.

(f) All ordered or offers to purchase goods from plaintiff which were received at its Georgia office or in any other manner in the State of Georgia for transmittal to plaintiff's aforesaid office in Alabama were subject to approval and acceptance at said office, or at one of plaintiff's warehouses located outside the State of Georgia, and the acknowledgment of receipt of said offer expressly so stated.

In all cases where ordered or offers to purchase goods from plaintiff were accepted by it as above alleged, the goods were shipped in interstate commerce by plaintiff from its factories or warehouses without the State of Georgia to the purchasers by common carrier f.o.b. shipping point.

(g) All credit matters were handled at plaintiff's Alabama office where credit information was obtained and all credit questions passed on. All invoices were prepared and mailed from and all collections were made by plaintiff's office in Alabama.

14.

For the reasons herein set out, plaintiff alleges that it did not carry on in Georgia any operations or activities rendering it liable to pay to the State of Georgia income

taxes, and that it did not have or receive any net income from property owned or business done in Georgia during the years 1952, 1954 or 1955, and all of said taxes herein referred to were illegally collected and should be refunded to plaintiff, together with interest thereon at the rate of 6% per annum for the following reasons:

[fol. 27] (a) The following paragraph of the Georgia Income Tax Statute, under which statute said tax was collected, to-wit, the first paragraph of Section 92-3113 of the 1933 Code of Georgia, as amended by Act of the General Assembly of Georgia approved February 16, 1950 (Georgia Laws 1950, pages 299-303), and which reads as follows:

> "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce,"

is illegal and invalid and in violation of the Fourteenth Amendment of the Constitution of the United States (Article XIV, Section 1, of the Constitution of the United States; Code of Georgia of 1933, Section 1-815), which among other things provides:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.",

because said part of said statute attempts to authorize the State of Georgia to tax a foreign corporation which is not actually present in the State and is not actually doing

business therein, and with respect to which no taxable event occurs in Georgia, and to measure such tax by sales and transactions conducted and concluded entirely without the territorial limits of the State of Georgia, which constitutes a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States above referred to.

[fol. 28] (b) The following part of the Georgia Income Tax Statute, under which statute said tax was collected, to-wit, the first paragraph of Section 92-3113 of the 1933 Code of Georgia, as amended by Act of the General Assembly of Georgia approved February 16, 1950 (Georgia Laws 1950, pages 299-303), which reads as follows:

> "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce,"

is illegal and void and in violation of Article 1, Section VIII, Paragraph III, of the Constitution of the United States (Code of Georgia of 1933, Section 1-125 (3)), which provides as follows:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

for the reason that said statute attempts to authorize the State of Georgia to levy an income tax on income derived from sales consummated by plaintiff entirely in the course of interstate commerce and in connection with which no element or part of said sale occurs in the State of Georgia,

and is a direct interference with and a burden on interstate commerce in contravention and violation of the commerce clause of the Federal Constitution quoted above.

[fol. 29] 15.

Plaintiff alleges that the collection of said taxes and the taxation by the State of Georgia of income derived from sales and transactions occurring entirely beyond the territorial limits of the State of Georgia is illegal and invalid and in violation of the Fourteenth Amendment of the Constitution of the United States (Article XIV, Section 1, of the Constitution of the United States; Code of Georgia of 1933, Section 1-815), which among other things provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.",

for the reason that the State of Georgia has no right, power or authority to interfere in any way with or to regulate or tax income derived from sales conducted and consummated entirely without the territorial limits of the State of Georgia, and the taxation of such transactions constitutes a denial of due process of law under the Constitutional provisions above quoted.

16.

The collection of said taxes by defendant was illegal and unconstitutional for the reason that under the facts herein alleged it is an unconstitutional interference with and burden on interstate commerce and is in violation of Article I, Section VIII, Paragraph III, of the Constitution of the United States (Code of Georgia of 1933, Section 1-125 (3)), which provides as follows:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;",

for the reason that the collection of income taxes by the State of Georgia on income derived from sales consummated by plaintiff entirely in the course of interstate commerce, and entirely without the State of Georgia, and in connection with which no element or part of said sale occurs in the State of Georgia, is a direct interference with and burden on interstate commerce.

[fol. 30] Wherefore, plaintiff prays for judgment against defendant in his official capacity as State Revenue Commissioner in the amount of $1,478.31, with interest thereon from the date of payment, as provided by law, together with the costs of this action, and that process issue requiring said defendant to be and appear on the appearance day of this case, as fixed by the service of this petition, to answer this complaint.

/s/ White, Bradley, Arant, All & Rose.

P. O. Address: 2100 Comer Building, Birmingham 3, Alabama.

/s/ John Izard, Jr., W. K. Meadow, Spalding, Sibley, Troutman, Meadow & Smith, Attorneys for Plaintiff.

P. O. Address: 434 Trust Company of Georgia Building, Atlanta 3, Georgia.

[File endorsement omitted]

[fol. 31]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

[Title omitted]

ANSWER—Filed July 12, 1956

Now comes T. V. Williams, as State Revenue Commissioner of the State of Georgia, Defendant, and files this his answer to the Plaintiff's petition and respectfully shows to the Court:

1.

The Defendant admits the facts alleged in Paragraph 1 of the Plaintiff's petition.

2.

The Defendant admits the facts alleged in Paragraph 2 of the Plaintiff's petition.

3.

The Defendant admits the facts alleged in Paragraph 3 of the Plaintiff's petition.

4.

For want of sufficient information, the Defendant can neither admit nor deny the facts alleged in Paragraph 4 of the Plaintiff's petition except that Defendant admits that the Superior Court of Fulton County, Georgia has jurisdiction of this action.

5.

The Defendant denies the facts alleged in Paragraph 5 of the Plaintiff's petition.

6.

The Defendant admits the facts alleged in Paragraph 6 of the Plaintiff's petition.

7.

The Defendant admits the facts alleged in Paragraph 7 of the Plaintiff's petition.

8.

The Defendant admits the facts alleged in Paragraph 8 of the Plaintiff's petition.

[fol. 32]

9.

The Defendant denies the facts alleged in Paragraph 9 of the Plaintiff's petition.

10.

For want of sufficient information, the Defendant can neither admit nor deny the facts alleged in Paragraph 10 of the Plaintiff's petition.

11.

For want of sufficient information, the Defendant can neither admit nor deny the facts alleged in Paragraph 11 of the Plaintiff's petition.

12.

For want of sufficient information, the Defendant can neither admit nor deny the facts alleged in Paragraph 12 of the Plaintiff's petition.

13.

For want of sufficient information, the Defendant can neither admit nor deny the facts alleged in Paragraph 13 of the Plaintiff's petition.

14.

The Defendant denies the facts alleged in Paragraph 14 of the Plaintiff's petition.

15.

The Defendant denies the facts alleged in Paragraph 15 of the Plaintiff's petition.

16.

The Defendant denies the facts alleged in Paragraph 16 of the Plaintiff's petition.

Wherefore, the Defendant having fully answered Plaintiff's petition prays that said petition be dismissed, judg-

ment awarded the Defendant, and all costs of the action charged to the Plaintiff.

[fol. 33] /s/ Eugene Cook, The Attorney General, /s/ William L. Norton, Jr., Assistant Attorney General, /s/ Ben F. Johnson, Jr., Assistant Attorney General, Attorneys for Defendant.

132 State Judicial Bldg., Atlanta, Ga.

[File endorsement omitted]

[fol. 34] Certificate of Service (omitted in Printing).

[fol. 36]

IN THE SUPREME COURT OF GEORGIA

Case No. 19838

STOCKHAM VALVES & FITTINGS, INC.,

v.

WILLIAMS, State Revenue Commissioner.

DECISION—November 8, 1957

By the Court:

The Georgia Income Tax Statute (Code, Ann. Supp., § 92-3113) as applied to the plaintiff, a non-resident corporation with its home office and manufacturing plant outside of the State of Georgia—which maintained only a sales-service office in this state, which was used as headquarters by one of its sales representatives, who spent about one-third of his time in that office or traveling within this State, and in which office a small amount of office furniture, valued at approximately $1,000, was maintained, and one woman secretary was employed, and where the sales representative carried on the ordinary duties of a salesman in Georgia calling on customers and prospective customers, but no orders were accepted within the State

of Georgia, and all sales were made on an "f.o.b. warehouse" basis and were completed at warehouses outside of the state by deliveries to customers or to common carriers consigned to customers—violates both the commerce and due-process clauses of the Federal Constitution (Code §§ 1-125 (3), 1-815), and the trial court erred in sustaining its validity as against such attacks.

[fol. 37] This was an action brought by Stockham Valves & Fittings, Inc., (hereinafter referred to as the plaintiff) against T. V. Williams as Revenue Commissioner of the State of Georgia, to recover income taxes paid by the plaintiff under protest to the state for the calendar years 1952, 1954, and 1955, assessed against the plaintiff under the following Georgia Income Tax Statutes: Code (Ann. Supp.) § 92-3102, which provides that "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to four percent of the net income from property owned or from business done in Georgia, as defined in section 92-3113"; and Code (Ann. Supp.) § 92-3113, which provides that "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce." Claims for refund of the taxes paid having been denied by the defendant, the present suit was brought.

The plaintiff contends that all of its activities within the State of Georgia are a part of and inseparable from interstate commerce, and that any income tax assessed against the plaintiff is a direct burden on such commerce and violates the commerce clause of the Federal Constitution (Code § 1-125 (3)); that the fact that the plaintiff maintains one sales-service office in Georgia and one of its sales representatives spends one-third of his time in

Georgia does not make the plaintiff present in the state in any substantial sense, and an attempt to subject it to [fol. 38] an income tax violates the due-process clause of the Federal Constitution (Code § 1-815). No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable; but the plaintiff contends that the state is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce.

The facts were stipulated, and the issue was submitted to the trial judge without a jury; and to the judgment upholding the validity of the statute and the tax the plaintiff excepts.

From the stipulation of facts it appears that the plaintiff is a corporation organized under the laws of Delaware with its principal or home office and its manufacturing plant located in Birmingham, Alabama. Since 1905, and including the tax years in question, it has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of valves and pipe fittings which it manufactured. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham, Ala., Philadelphia, Pa., Chicago, Ill., Houston, Tex., and Vernon, Calif. It maintained established sales-service offices at the foregoing locations and also at Cambridge, Mass., New York, N. Y., Atlanta, Ga., Pittsburgh, Pa., San Francisco, Calif., Washington, D. C., Dallas, Tex. and St. Louis, Mo. Purchasers of plaintiff's valves and pipe fittings were located in all the United States.

As a matter of policy and practice, during the tax years in question, the plaintiff made sales only to establish (sic) local wholesalers and jobbers and (except for sales to makers of automatic-sprinkler systems) made no sales directly to users and installers of valves and pipe fittings. The local [fol. 39] wholesalers and jobbers who handled the plaintiff's products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangement, to the distribution

of the plaintiff's products. Any established local wholesaler or jobber, having established credit, was considered as a prospective customer and could buy from the plaintiff. Established local wholesalers and jobbers who did buy from the plaintiff were entirely free to discontinue buying from it at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

The plaintiff, during the years in question, made no sales on a consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession, which was not available to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

All orders for the plaintiff's products were contractually accepted or rejected at the home office of the plaintiff in Birmingham, Alabama. No representative of the company at any sales-service office had any authority to, or did, contractually accept or reject any order under any circumstances. Contractual authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the company's home office in Birmingham directly from wholesalers and jobbers. Such orders as were received at sales-service offices, or by [fol. 40] the solicitation of sales representatives working out of sales-service offices, were relayed by mail, telephone (sic) or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

The plaintiff had no plant or warehouse in Georgia. All sales were made on an "f.o.b. warehouse" basis, and were completed at the plant or warehouse by deliveries to customers or to common carriers consigned to customers.

Since 1950, and during the tax years in question, the plaintiff maintained a sales-service office in Atlanta. One of its sales representatives used this office as his head-

quarters. He worked in a territory which included Georgia, North Carolina, South Carolina, and parts of Tennessee and Virginia. Part of Florida was also included in his territory until 1954. This representative spent approximately one-third of his time at the Atlanta sales office or traveling in the State of Georgia. The other two-thirds of his time was spent traveling outside of Georgia. He was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office.

The plaintiff also employed at its sales-service office in Atlanta a full-time woman secretary. She functioned on the basis of her own knowledge and experience and literature furnished by the company as a source of information concerning the plaintiff's products. She performed stenographic and clerical duties and facilitated communications between the plaintiff's home office in Birmingham, the plaintiff's sales representative when he was out in the territory, and customers, prospective customers, contractors, and users of the plaintiff's products. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers, or other [fol. 41] people interested in the plaintiff's products.

The Atlanta sales-service office was listed in the Atlanta telephone directories in the plaintiff's name in both the alphabetical and classified business listings. The office was listed in the plaintiff's name in the Atlanta city directories. The company, on its sales-service office letterheads, in its catalogues and discount sheets, and on some promotional material, listed the fact that it maintained a sales-service office in Atlanta. A small amount of office furniture was maintained there of the approximate value of $1,000. The representative carried on the ordinary duties of a salesman in Georgia. No orders were, however, accepted within the State of Georgia. All sales were completed at warehouses outside of the State by deliveries to customers or to common carriers consigned to customers. All such sales took place outside of Georgia.

At no time during the tax years in question did the plaintiff qualify to do business within the State of Georgia; no officers or director of the plaintiff was a resident of

Georgia; the Atlanta sales representative was a resident of the State. During the tax years in question, rent, salaries, and all other expenses of the Atlanta office were paid by check drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of the plaintiff in Georgia had authority, either alone or with any other person, to draw checks upon or make withdrawals from any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office, where they were reviewed and paid by checks. The plaintiff kept no bank account in the State of Georgia. All credit matters were handled at the plaintiff's Alabama office, where credit information was obtained and all credit [fol. 42] questions were passed on. All invoices were prepared and mailed from and all collections were made by the plaintiff's office in Alabama. No employee of the plaintiff in Georgia had authority to accept nor did any employee accept any order, bind plaintiff to furnish goods, arrange credit terms, or make collections.

Hawkins, Justice. (After stating the foregoing facts.) That the decision of the questions here presented is not without difficulty, is pointed out by the Supreme Court of the United States in the recent decision in Freeman v. Hewit, 329 U. S. 249, 252 (67 Sup. Ct. 274, 91 L. ed. 265), where it is said: "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." In LeLoup v. Port of Mobile, 127 U. S. 640, 648 (8 Sup. Ct. 1380, 32 L. ed. 311), the Supreme Court stated the fundamental limitations of the commerce clause on state taxation as follows: "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects

of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden [fol. 43] on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Forrester v. Culpepper, 194 Ga. 744, 748 (22 S. E. 2d 595), this court quoted with approval from Interstate Bond Co. v. State Revenue Com., 50 Ga. App. 744, 751 (179 S. E. 559), the following: "The general view is that an income tax is not a property tax, but more in the nature of an excise tax." In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), a Massachusetts excise tax, based on the proportion of a company's assets employed in the state and the proportion of its net income derived in the state, was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. The taxpayer maintained a branch sales office in Massachusetts, which was used as headquarters by its traveling salesmen. It owned office equipment there, and its local manager handled petty cash items for the company through a bank account maintained in his own name. The court found that all of the taxpayer's activities were an integral part of interstate commerce, and therefore held the excise unconstitutional. The court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state." In Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), it is said: "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate [fol. 44] in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

From the foregoing statement of facts it appears without dispute that the plaintiff was engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned; and in Atlantic Lumber Co. v. Commissioner of Corporations and Taxation of Massachusetts, 298 U. S. 553, 555 (56 Sup. Ct. 887, 80 L. ed. 1328), it was held: "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

Counsel for the defendant contend that a tax on net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce; but, as previously pointed out, we have held that an income tax is in the nature of an excise tax, and in the footnote added to the dissenting opinion written by Mr. Justice Reed in Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 677 (69 Sup. Ct. 1264, 93 L. ed. 1613), it is said: "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned. In Ozark and Anglo-Chilean Nitrate the taxes were called franchise taxes; In Alpha it was labeled an excise tax." In Dennison Mfg. Co. v. Wright, 156 Ga. 789 (3-b) (120 S. E. 120), this court held: "Where a foreign corporation rents and maintains an office in this State, with a stock of samples and a force of office employees and traveling salesmen, merely [fol. 45] to obtain orders in this State and other States, subject to approval by its home office, for its goods to be shipped directly to its customers from its home State, such an arrangement is part of its interstate commerce, and not subject to a local excise tax."

We are also of the opinion that the income-tax statute here under consideration, as applied to the plaintiff, violates the due-process clause of the Federal Constitution. We take it that no one will question the fact that a state may not tax activities carried on outside its borders without violating this provision of the Constitution. The

question in every such case is whether such a connection exists between a business and the taxing state as to permit the imposition of a general income tax on a portion of the net income of the business; and in Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (61 Sup. Ct. 246, 85 L. ed. 267), the Supreme Court said: "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." See also Miller Brothers Co. v. Maryland, 347 U. S. 340, 344 (74 Sup. Ct. 535, 98 L. ed. 744), where the foregoing rule was applied to facts quite similar to those in the instant case. There the court said: "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." After referring to its previous decisions, that court said: "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental [fol. 46] period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This court, in Redwine v. Dan River Mills, 207 Ga. 381 (61 S. E. 2d 771), held that activities more extensive than those carried on by the plaintiff did not constitute "doing business" within the meaning of the income-tax act then in effect; and in Suttles v. Owens-Illinois Glass Co., 206 Ga. 849 (59 S. E. 2d 392), it was held that accounts growing out of similar activities in Georgia did not have a tax situs in Georgia. See also Norton Co. v. Department of Revenue of Illinois, 340 U. S. 534 (71 Sup. Ct. 377, 95 L. ed. 517).

We hold, therefore, that as applied to the plaintiff the Georgia Income Tax Act violates both the commerce and due-process clauses of the Federal Constitution, and the trial court erred in rendering judgment against the plaintiff. The cases mainly relied upon by the defendant, namely, U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321 (38 Sup. Ct. 499, 62 L. ed. 1135); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (41 Sup. Ct. 45, 65 L. ed. 165); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (43 Sup. Ct. 620, 67 L. ed. 1051); Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 (62 Sup. Ct. 857, 86 L. ed. 1090); West Publishing Co. v. McColgan, 27 Cal. 2d 705 (166 Pac. 2d 861), and others, are clearly distinguishable on their facts. In those cases the taxpayers were either residents of the taxing State, or were carrying on within the State extensive intrastate as well as interstate business, or else the statements therein made which would [fol. 47] seem to conflict with the rulings here made were obiter. In Freeman v. Hewit, 329 U. S. 249, 255 (67 Sup. Ct. 274, 91 L. ed. 265), the Supreme Court of the United States recognized that the taxing power permitted by the U. S. Glue Company case, supra, was applicable only to residents of a State. It was said: "It [a State] can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." The Underwood Typewriter decision, supra, was explained and limited in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), where the court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles." The dictum in the Beeler case, supra, was expressly disapproved as such by the Supreme Court in Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), in the following language: "Any suggestion in that opinion as to the possible validity

of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As already pointed out by the United States Supreme Court, its decisions dealing with the problem here presented are spread through hundreds of volumes of its reports, and all of its pronouncements are not consistent or reconcilable. To attempt to harmonize all that has been said, would neither clarify what has gone before nor guide the future, and to undertake here to point out the distinguishing features of each of the numerous decisions [fol. 48] would only consume unnecessary time and space.

Judgment reversed. All the Justices concur except Head, J., who dissents.

[fol. 49]

IN THE SUPREME COURT OF GEORGIA

JUDGMENT—November 8, 1957

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered: Stockham Valves & Fittings, Inc., v. T. V. Williams, State Revenue Comr. This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reason stated in the opinion this day filed. All the Justices concur except Head, J., who dissents.

[fol. 59]

IN THE SUPREME COURT OF GEORGIA

ORDER DENYING MOTION FOR REHEARING—November 26, 1957

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: Stockham Valves & Fittings, Inc., v. T. V. Williams, State Revenue Comr.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. Head, J., dissents.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—March 17, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 512

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ———

STATE OF MINNESOTA,

Respondent,

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Minnesota entered in this action on September 10, 1957, affirming the judgment of the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota, and submits this statement in support of its contention that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the State Supreme Court in this action has not as yet been officially reported. The unofficial opinion is reported at 84 N.W. 2d 373. A copy of the opinion of that Court, the dissenting opinions and Judgment, are attached hereto as Appendix "A". Copies of the District Court's (trial court's) Findings of Fact, Conclusions of Law and Order for Judgment dated August 31, 1955, and Memorandum attached thereto; Order for Amended Findings of Fact, Conclusions of Law and Order for Judgment, dated October 11, 1955; and Judgment dated November 4, 1955, are attached hereto as Appendix "B". They have not been reported.

JURISDICTION

The State of Minnesota here initiated proceedings to collect state income taxes, penalties and interest from Appellant taxpayer, who defended on the ground that the statute under which the tax was sought to be imposed contravened the United States Constitution. The judgment from which this appeal is taken is the judgment of the State Supreme Court entered on September 10, 1957, following the decision of that Court upholding the validity of the statute rendered on June 14, 1957. A timely petition for reargument was filed by appellant on July 25, 1957, and was denied by the Minnesota Supreme Court on August 28, 1957. Notice of Appeal was filed by Appellant in the State Supreme Court on September 12, 1957.

The jurisdiction of the Supreme Court of the United States to review the decision and judgment of the State Supreme Court by direct appeal is conferred by *28 U.S.C. 1257(2)* and

2101(c) and is sustained by the following cases: *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954); *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 425 (1952); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946). In *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945), the court stated (p. 185):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

STATUTE INVOLVED

The pertinent statute involved in this action now appears as Section 290.03 of the *Minnesota Statutes*. The statutory history of this section is set forth and attached hereto as Appendix "C". Its provisions insofar as are applicable are as follows:

> "290.03. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state *or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;* (emphasis supplied.)

QUESTIONS PRESENTED

A. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States* insofar as it is sought to impose a tax on the net income of a foreign corporation whose business consists exclusively of interstate commerce?

B. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Due Process Clause of the Fourteenth Amendment of the Constitution of the United States* insofar as it is sought to impose a tax on the income of a foreign corporation which arises out of sales consummated exclusively without and beyond the boundaries of the State of Minnesota?

STATEMENT OF CASE

The Northwestern States Portland Cement Company, Appellant here, is an Iowa corporation. Its principle offices and place of business are in Mason City, Iowa (R. 189, f. 1).[1]

Appellant is not now and has never qualified to do business in the State of Minnesota, (R. 189, f. 3) nor has the State of Minnesota ever demanded that Appellant do so.

The State of Minnesota contends that Appellant was subject to taxation under its Income Tax Act, and thus seeks to impose upon and collect from Appellant income taxes on its net income for the years 1933 through 1948. Appellant filed no returns with the State of Minnesota for the years

[1] References are to the printed record before the Minnesota Supreme Court, copies of which are being submitted to the Clerk of this Court.

material hereto (R. 189, f. 3). The State then through its Commissioner of Taxation, prepared and filed income tax returns for Appellant for such fiscal years based on information available to the Commissioner of Taxation, and assessed against Appellant the income taxes shown to be due on the said returns (R. 189, f. 3). In preparing these returns, the Commissioner used the so-called three-factor formula involving sales, tangible property, and payroll, described in Minnesota Income Tax Act, Section 290.19 in determining the portion of Appellant's over-all net income for each of the fiscal years involved which was to be allocated to Minnesota and subjected to the income taxes imposed by the State (R. 190, f. 1). Appellant refused to pay the tax so assessed and demanded of it by the State of Minnesota, and all the taxes so assessed are in issue here.

Appellant was engaged in the manufacture and sale of cement at its home office and plant located in Mason City, Iowa (R. 191, f. 1). It maintained only a sales office in the State of Minnesota, in Minneapolis, and occupied it under a lease that was negotiated and paid for from Appellant's home office in Iowa (R. 191, f. 1). Its function was a clearing house for orders customers telephoned or mailed into this office in the course of interstate commerce (R. 193, f. 3). Appellant owned no real estate in Minnesota and its only personal property in the state was its salesmen's automobiles, its office furniture and fixtures and a small amount of office supplies and good will advertising material passing through its Minneapolis sales office (R. 191, f. 2).

During the years involved in this proceeding, Appellant had from two to six employees in the State of Minnesota. Two salesmen and a secretary operated out of the Minneapolis office (R. 191, f. 3). The other employees of Appellant in

Minnesota operated directly out of their homes. All employees of Appellant residing or working in Minnesota were hired by supervisory personnel at Appellant's home office in Mason City, Iowa (R. 191, f. 3). No employee of Appellant in the State of Minnesota had at any time any authority to hire or fire any other employee (R. 192, f. 1), to establish or change any of the policies or procedure of the Appellant, or to conduct any of Appellant's business, whatsoever, other than solicitation of customers for Appellant's products (R. 192, ff. 2-3).

Appellant maintained no bank account or petty cash fund in the State of Minnesota (R. 192, f. 2). All salaries paid to Appellant's employees in Minnesota were fixed by the sales manager in Mason City, Iowa, and were paid directly from Appellant's home office in Iowa (R. 192, f. 2). Its employees in Minnesota were on a straight salary basis and received no commissions. The territories of its salesmen in Minnesota were allocated by the home office and no authority to reallocate these territories was given to any of Appellant's employees in Minnesota (R. 192, f. 3).

All orders received by Appellant's salesmen in the State of Minnesota were transmitted daily to Appellant's home office in Iowa where there, and there only, they were passed upon for acceptance or rejection (R. 57, f. 2; R. 118, f. 2). All orders received from its salesmen in Minnesota were acknowledged from Appellant's home office in Mason City, directly to the customers (R. 216, f. 2). All sales contracts were executed at its Mason City office and were sent directly to the customers involved (R. 216, f. 2). No employee in Minnesota had authority to accept or reject a customer's order or to approve or pass on a customer's credit (R. 216, f. 2). Credit extensions, collections and adjustments were

handled exclusively by the home office in Mason City (R. 216, f. 3).

All merchandise was invoiced and shipped by rail from Appellant's home office at Mason City, directly to its purchasers (R. 195, f. 3). No warehouse was maintained for storing its merchandise within the State of Minnesota and none was so stored (R. 195, f. 3).

When Appellant failed to pay the taxes assessed by the Commissioner of Taxation, the State of Minnesota commenced this action on December 9, 1953, to collect the said taxes. The trial began on November 8, 1954 in the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota (R. 24, f. 2). The judgment of that Court, in favor of the respondent, the State of Minnesota, was entered on November 4, 1955 (R. 218). The District Court held that the attempt of the State of Minnesota to impose its taxes upon Appellant was not in violation of the Commerce Clause, Article I, Section 8, Clause 3, nor of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. It was this decision which was affirmed by a divided Minnesota Supreme Court and hence this appeal.

The income taxes, penalties and interest assessed against Appellant for its fiscal years 1933 through 1948 and adjudged in the proceedings below to be payable amounted to over $107,000.00 (R. 218, f. 3).

HOW THE FEDERAL QUESTION IS PRESENTED

The federal questions involved herein were first raised by Appellant in its original pleading at the inception of this action wherein it asserted:

> "That the attempted imposition of the tax, penalties and interest referred to in plaintiff's complaint, and the

applicable Minnesota Statutes under which said imposition is attempted, being Chapter 290, Minnesota Statutes, 1949, and in particular 290.03 thereof, are invalid and void as being in conflict with and in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States (R. 22, f. 1).

"That the attempted imposition of the tax, penalties and interest referred to in plaintiff's complaint, and the applicable Minnesota Statutes under which said imposition is attempted, being Chapter 290, Minnesota Statutes, 1949, and in particular 290.03 thereof, are invalid and void as depriving defendant of its property without due process of law, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, by imposing a tax on the income of defendant which arises from and is a result of business conducted without and beyond the State of Minnesota and the jurisdiction thereof (R. 22-23, f. 3).

On these questions thus raised by Appellant, the District Court, Hennepin County, Minnesota, in its Findings of Fact and Conclusions of Law rendered on August 31, 1955, ruled as follows:

"That the assessments against the defendant of the income taxes, penalties and interest which the State of Minnesota is here seeking to collect from the defendant is not in conflict with or in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States (R. 198, f. 3).

"That the assessments against the defendant by the State of Minnesota and the income taxes, penalties and interest which the plaintiff here seeks to collect from the defendant does not contravene the Due Process Clause of either the Fourteenth Amendment of the Federal Constitution or Article I, Section 7, of the Constitution of the State of Minnesota (R. 198, f. 3)."

The federal questions involved herein were again raised in the appeal to the Minnesota Supreme Court as a part of Appellant's formal assignment of error. The second assignment of error (A. br. 12) insofar as applicable, reads as follows:

> "2. The Trial Court erred in its conclusions of law wherein it concluded:
>
> * * *
>
> "(b) That the assessments against the defendant by the State of Minnesota and the income taxes, penalties and interest which the plaintiff here seeks to collect from the defendant does not contravene the Due Process Clause of either the Fourteenth Amendment of the Federal Constitution or Article I, Section 7, of the Constitution of the State of Minnesota (R. 198, f. 3).
>
> "(c) That the assessments against the defendant of the income taxes, penalties and interest which the State of Minnesota is here seeking to collect from the defendant is not in conflict with or in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States (R. 198, f. 3)."

The Minnesota Supreme Court by a divided court, affirmed the trial court's decision (See Opinion of Court, Appendix "A").

THE QUESTIONS ARE SUBSTANTIAL

A. Commerce Clause Question

Article I, Section 8, Clause 3 of the Constitution of the United States, provides that Congress shall have the power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

This clause is not merely an authorization to Congress to enact laws for the protection and encouragement of com-

merce among the states, but by its own force, created an area of trade free from interference by the states and, in short, it is a limitation upon the states without implementing legislation by Congress. *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946).

The statute here in question, on the face of it, imposes a tax (so defined by the Minnesota Supreme Court) upon the net income of foreign corporations "whose business within" Minnesota "consists exclusively of * * * interstate commerce * * *."

The trial court, in an unchallenged finding, specifically determined that all of Appellant's activities *"were an integral part of interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce"* (R. 194, f. 3), which the Minnesota Supreme Court in its opinion stated was sustained by the evidence.

The regulations promulgated by the Commissioner of Taxation of the State of Minnesota and in effect approved by the State Supreme Court, provide in part as follows:

> "All corporations, domestic or foreign whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M.S.A. 290.03(1)." *Minnesota Income Tax Regulations*, § 2003(1).

The evidence indicated that 48% of Appellant's total shipments were made from Iowa into the State of Minnesota. The majority of the Minnesota Supreme Court based its decision on that fact alone. Thus, it establishes a totally new concept of trade and commerce between the states—that is, the Minnesota decision holds that, where the volume

of shipments from one state into a neighboring state is a substantial portion of the shipper's total, that commerce in effect becomes "localized" and thus "separated" from ordinary interstate commerce. The Minnesota Supreme Court did not attempt to delineate the precise volume or percentage of total shipments that would be necessary to effect this localization or separation from commerce. But, presumably, at some point, a less extensive volume or percentage of shipments between two neighboring states would be entitled to the protection of the Commerce Clause. This appears to be an entirely new theory never advanced by any court heretofore and certainly contrary to the decisions and pronouncements of this Court.

In the area of state taxation, this Court has continuously upheld the basic principle embodied in the Commerce Clause which is to prevent the interference with, discrimination against, and undue burden upon interstate commerce. *Brown v. Maryland*, 12 Wheat. 419 (1897); *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S. Ct. 592 (1887); *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147, 38 S. Ct. 295 (1918); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946); *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477.

While this Court has, in some few instances, seemingly deviated from or made certain exceptions to this basic principle, such is not actually the case. Only in instances where this Court has found the activity or object of the tax to be local in nature and not actually a part of interstate commerce, *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938); *Memphis Natural Gas Co. v.*

Stone, 335 U.S. 80, 68 S. Ct. 1475 (1948); or where a tax has been imposed either before interstate commerce begins or after it ends, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940); or in some instances, where the tax has been upon certain of the instrumentalities used in interstate commerce in lieu of an ad valorem property tax, *Great Northern Railway Co. v. State of Minnesota*, 278 U.S. 503, 49 S. Ct. 191 (1929) has this Court sustained a tax which may have had the appearance of one imposed upon interstate commerce. It has also permitted, in some cases, the inclusion of interstate proceeds as well as intrastate proceeds in the measure of a tax where the object of the tax was intrastate activity or the privilege of carrying on intrastate business. *International Harvester v. Evatt*, 329 U.S. 416, 67 S. Ct. 444, (1947).

This Court, however, has never waivered from the principle that interstate commerce itself, or the privilege of engaging in interstate commerce, may not be subjected to state taxation.

In the recent decision of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954), this Court stated (p. 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

That which is exclusively interstate commerce has never before been subjected to state taxation with the approval of this Court.

One of the early leading cases decided in this field is *Cheney Bros. Co. v. Commonwealth of Massachusetts*, 246

U.S. 147, 38 S. Ct. 295 (1918). There the taxpayer was a Connecticut corporation engaged in the manufacturing and selling of silk fabrics. It maintained a selling office in Boston with one office salesman and four other salesmen who traveled throughout the New England states. The salesmen, like those employed in Minnesota by the Appellant in the case at bar, solicited and took orders subject to approval by the home office in Connecticut, and the corporation shipped goods directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. The Boston office retained copies and records of orders taken, but did no bookkeeping and made no collections. The corporation did no other business in the state. In holding that Massachusetts' imposition of taxes on this corporation's net worth was repugnant to the Commerce Clause, the following observation was made (p. 148):

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause.*" (Emphasis supplied.)

Following the decision in the *Cheney* case, this Court was called upon to further consider the Massachusetts corporation excess and income tax in a factual situation almost identical to that involved in the instant case. In *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct.

477, (1925), a New Jersey corporation engaged in the manufacturing and sale of cement, maintained an office in Boston, Massachusetts, under the charge and supervision of the district sales manager, where the corporation's correspondence and other customary sales activities in connection with the solicitation of orders were carried on. The office was used as a headquarters for traveling salesmen who solicited orders in Massachusetts and other New England states. As in the instant case, orders received by the taxpayer's Boston office were transmitted to the home office of the corporation to be passed on and accepted. All goods and invoices were sent directly to the customer. The corporation kept no samples or other merchandise in Massachusetts and its only property in that state was its office furniture and fixtures. Its salaries and office rent were paid from its home office. The corporation maintained no general bank account in Massachusetts but it did keep an incidental account in Boston for the payment of minor expense items.

On the basis of these facts, it was held that the imposition on the taxpayer of the corporate excise and income tax involved was void as being in violation of and repugnant to the Commerce Clause of the *United States Constitution.* This Court stated at page 219:

> "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in *Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state.* The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden." (Emphasis supplied.)

In *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951) this Court re-emphasized the controlling authority of its earlier decisions in *Cheney Bros. Co. v. Massachusetts*, supra, and *Alpha Portland Cement Co. v. Massachusetts*, supra, and established beyond any doubt that a state tax upon income produced exclusively from interstate commerce is void.

There the following principles were reaffirmed (pp. 609, 610):

> "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.
>
> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. * * *
>
> * * *

> *"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law. McCulloch v. Maryland, supra."* (Emphasis supplied.)

In seeking to justify the validity of a tax imposed upon exclusively interstate commerce, the Minnesota Supreme Court relied upon certain language in some of the decisions of this Court during the interval between the *Cheney* and *Alpha Portland Cement* cases and the *Spector* case in 1951. More specifically such cases as *West Publishing Co. v. McColgan*, 328 U.S. 823, 66 S. Ct. 1378 (1946); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940) and *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 62 S. Ct. 857 (1942) were relied upon. Concededly this Court in the *Beeler* case did make the observation, solely as dictum, however, that a non-discriminatory tax by a state on the net income of a foreign corporation doing solely an interstate business is not prohibited. In any event, when *Spector* was decided this Court clarified its position (p. 609) as to language of *Beeler* by stating:

> "The decision in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, upheld a Tennessee tax on earnings of the taxpayer within that State *where the earnings were derived from the intrastate distribution* of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case." (Emphasis supplied.)

In this case, however, the Minnesota Supreme Court did exactly what this Court in *Spector* indicated could not be done, for the Minnesota court in the very first two sentences of its opinion in approving the tax characterized the Appellant as a foreign corporation "engaged exclusively in interstate commerce", and emphasized that the "* * * tax relates to income derived solely from interstate commerce business * * *".

In relying upon the *Berwind-White* case, the majority opinion of the Minnesota Supreme Court wholly failed to take the principles of *Alpha* and *Cheney* into account. The Court of Appeals for the Second Circuit fell into the same error when the *Spector* case was before it in 1944 (139 F. 2d 809), but with one significant difference. There, Judge Clark, speaking for the majority, recognized that this Court had not, as of that date (1944), permitted state taxation of net income produced solely from interstate commerce activities.

However, although recognizing that both *Alpha* and *Cheney* barred any tax on "net income" produced exclusively from interstate commerce, Judge Clark was then of the view that certain doctrinal trends appearing in decisions subsequent to both *Alpha* and *Cheney* had impaired their authority and he presciently anticipated a departure by this Court from the principles of those decisions.

The danger involved in such thinking was pointed up by Judge L. Hand in his dissenting opinion (p. 823) wherein he stated in part:

> "* * * Up to the present, so far as I can see, the immunity of interstate commerce from such taxation as such has rested upon the same considerations which still prevail as to the immunity of an activity of the United States."

As pointed out, this Court in *Spector* reversed the Second Circuit, and sustained the principles enunciated in the dissent of Judge Hand and reaffirmed *Alpha* and *Cheney*.

This the majority of the Minnesota Court has failed to comprehend or refuses to recognize. On the other hand, the dissenters on the Minnesota Court stand firmly behind the principles laid down by this Court in *Spector* and the authorities therein affirmed.

This Court has stated again and again:

> "The very purpose of the Commerce Clause was to create an area of free trade among the several states. That Clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States. McLeod v. J. E. Dilworth Co., 322 U.S. 327; 330-331 (1944);".

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157; 74 S. Ct. 396, (1954).

If each state be free to establish its own barriers to interstate commerce by the simple expedient of imposing its own tax, at its own special rate, and under its own formula upon such commerce, chaos must necessarily result and there can be no area of that "free trade among the several states" so jealously guarded by this Court and by the Constitution of the United States.

The result of sustaining the position taken by the State of Minnesota would be to render the protection, intended for interstate commerce by the Constitution of the United States, null. The legislatures of every state could and undoubtedly would emulate Minnesota by imposing their own measure of income tax upon all interstate business within their states and regardless of whether there was any separate local or intrastate activity.

This could be accomplished under the theory of this Minnesota decision by merely labeling the proposed tax a "net income" tax and, with this magic key, the hitherto forbidden door to state taxation of exclusively interstate trade and commerce would open wide. The serious and chaotic consequences of such taxation must be obvious.

The issues involved in this case are becoming of ever increasing importance today and there appears to be mounting pressure and an inclination among several of the states' highest courts to whittle at the exclusive federal jurisdiction over interstate commerce. Louisiana,[2] and now Minnesota, have followed this trend whereas the highest court of Pennsylvania[3] has firmly adhered to the principles established by this Court in its interpretations of the Commerce Clause. At the present time there is a case[4] pending before the Supreme Court of Georgia in which the parties thereto seek to obtain the decision of the Georgia Court on these very same issues.

As a result of the conflict in these decisions, there has been much speculation about whether the mere denomination of a state tax as a "net income" tax rather than a "privilege" or "excise" tax which is measured by net income will insure the validity of such tax when its imposition is upon exclusively interstate commerce business.

It would seem unreasonable to suppose that merely changing the name of a tax would transform it from one that is invalid in its application to interstate commerce to one that

[2] *Fontenot v. John I. Hay Co.*, 228 La. 1031, 84 So. 2d 810 (1955)
[3] *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956)
[4] *Stockham Valves and Fitting, Inc. v. T. V. Williams, as State Revenue Commissioner of the State of Georgia;* on appeal from Superior Court of Fulton County to the Supreme Court of Georgia, Docket No. 19838.

is valid where no real difference exists between them other than the difference in their labels.

These so-called different taxes are identical in both their impact and effect. The measure of the tax and the amount sought to be collected are the same under each, and the burden imposed by one is no less than that imposed by the other. In fact, only a semantic distinction exists between the two types of taxes, for in substantive operation, there is none. As stated by Justice Rutledge (at p. 666) in *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S. Ct. 1264 (1949):

> "* * * we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels."

To allow the decision of the Minnesota Supreme Court in the instant case to stand would be to allow, in effect, a state court to judicially repeal the Commerce Clause of the Federal Constitution. Immediately there would be a mad scramble by the various states to levy various types of taxes on net income produced solely from interstate commerce. This possibility was predicted in a recent editorial in the *Minneapolis Star-Journal* (June 28, 1957 issue) where the following observations were made with respect to this very case.

> "The state based its case largely on the allegation that the cement company systematically solicits business in Minnesota and maintains a continuous flow of merchandise into the state.
>
> "This may indicate that the state tax commissioner will not try to collect an income tax from outside corporations which do business with Minnesotans only occasionally. But if the state Supreme Court decision is upheld by the United States Supreme Court, then many other out-

side companies will be required to file Minnesota income tax returns.

"California has an income tax law which similarly applies to outside businesses, and other income tax states probably will consider such provisions if the Minnesota law is upheld. Among tax officials the Minnesota litigation is looked upon as a 'landmark' case, one which will greatly clarify the tax obligations of interstate commerce to the states where it operates.

"For Minnesota, a favorable decision in the highest court will mean more revenue. In the view of some officials, it probably also will mean the establishment of more business branches in this state by outside companies which have shunned such branches to avoid paying the Minnesota income tax. If they must pay the tax anyway, they may change their policy on branch establishments.

"On the other hand, the decision could have the effect of limiting Minnesota's attractiveness as a state in which non-Minnesota concerns wish to do business, unless other states adopt similar legislation."

It was the fear of such a chaotic condition that brought about the adoption of the Commerce Clause originally. Its purpose was to prevent economic conflict between the states.

The importance of having an authoritative determination of this issue is pointed up in September 23, 1957, issue of the *State Tax Review*, a nationally circularized publication, wherein the following comment is made:

"The Minnesota Supreme Court has denied rehearing in Minnesota v. Northwestern States Portland Cement Co. and the taxpayer has filed a notice of its intention to appeal to the United States Supreme Court.

"Under challenge is a special direct income tax which Minnesota levies on corporations not subject to its

regular excise tax on income but engaged in interstate or foreign commerce within the jurisdiction.

"The Minnesota court upheld the constitutionality of the tax, ruling it was not upon the privilege of engaging in interstate commerce, but applied to activities and aspects of the taxpayer's business which had become localized in the state.

"The constitutional question in this case directly affects interstate taxpayers in California, Pennsylvania and Oregon—states which levy this type of tax on income. It will also be of interest to interstate taxpayers who have been subjected to income taxes in states like Georgia and Louisiana."

This fact was further emphasized by a nationally circulated release of the *National Association of Manufacturers* (dated July 8, 1957) wherein after an exhaustive digest of the opinion of the Minnesota Supreme Court, the following comment was made:

"In conclusion, the dissenters appear to have better support, logic and legal authority for their positions, based upon traditional concepts of the commerce clause. The basic problem in this type of litigation is the case-by-case judicial determination of what factual situations would bring a foreign corporation within the taxing power of a state. Here the majority almost too readily rationalizes the validity of the subject tax and in so doing creates a new concept as to what will constitute 'local activities' of a character that in effect removes such interstate business from the traditional protection of the commerce clause. If the position of the majority is to be considered as the present trend of judicial thought, at the state as well as the federal level, it would appear that those firms engaged in what has heretofore been deemed as exclusively interstate commerce are going to be in for a period of substantial readjustment in

> their sales methods or be exposed in many jurisdictions to costly contingent liabilities for state income taxes."

Apparently it was just such interruption of the free flow of commerce that this Court had in mind when it stated (p. 537) in *Norton Co. v. Department of Revenue of State of Illinois*, 340 U.S. 534, 71 S. Ct. 377 (1951):

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller."

In view of the fact that the decision here constitutes a clear departure from that rule, it is essential to the orderly free flow of commerce that this question finally be determined by this Court. Then foreign corporations, as the Minnesota Supreme Court has said Appellant was, which have chosen to stay at home and have engaged solely and exclusively in interstate commerce, may know just how far a state can go in imposing local taxes on their revenues.

B. Due Process Question

The Minnesota Supreme Court sustained state jurisdiction against the claim of lack of due process on the theory that regular and systematic solicitation of orders within a state is sufficient to subject the foreign seller to local tax jurisdiction. The decisions of this Court make it clear that before a state can tax a foreign corporation engaged in interstate commerce, it must find some local incidents apart from interstate activities of the corporation which are sufficient to bring the foreign corporation within the taxing power of the state.

In the absence of any such local incidents, the state has no local grip on the company and the attempted imposition of taxes on it is a taking of property without due process of law and accordingly void.

Jurisdiction to tax as circumscribed by the Fourteenth Amendment requires jurisdiction over the thing or the facet of the corporate activities to be taxed and not simply jurisdiction *in personam*. In applying this constitutional limitation this Court has invariably required proof of some local incident other than solicitation in order to uphold taxing jurisdiction. In other words, *in personam* jurisdiction over a foreign corporation may result from corporate presence in this state on matters unrelated to the doing of that business the privilege for which the corporation is sought to be taxed, whereas the jurisdiction to impose a tax for the privilege of doing business rests upon the existence of local incidents in connection therewith.

Here it is clear, as the trial court, in fact, found that Appellant taxpayer's manufacturing activities and all its contracts for sale of manufactured goods were executed and performed in Iowa. Its deliveries of merchandise to its Minnesota customers were all to railroad carriers in Iowa. Its activities in Minnesota were at the most, no more than "drumming activities" and were so described by the trial court (R. 199; f. 2). These activities consisted solely of sales promotion and, in some instances, solicitation of orders. They definitely did not confer jurisdiction to tax for there must be, in addition to such solicitation, local incidents of a sufficient nature to bring the Appellant's activities within the territory of the local taxing authority in order to justify the imposition of a tax for the privilege of doing business in the State of Minnesota.

Had Appellant been engaged in intrastate activities in Minnesota instead of confining itself solely to solicitation, such local activities might well have been claimed by Minnesota taxing authorities as a springboard from which a tax constitutionally could have been imposed on Appellant's revenue.

In the case at bar, however, there are no intrastate incidents which constitutionally would enable Minnesota to impose a tax of any kind on Appellant. As stated by this Court (at p. 392) in *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952):

> ". . . a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce."

In *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 74 S. Ct. 535 (1954), this Court stated (p. 344):

> "Our decisions are not always clear as to the grounds on which a tax is supported, * * *. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

See also *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Cheney Bros. Co. v. Commonwealth of Massachusetts*, 246 U.S. 147, 38 S. Ct. 295 (1918).

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of importance to the Appellant, to the commerce of our Nation, and to the public in general. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A:

No. 89 Hennepin County

STATE OF MINNESOTA,

Respondent,

36826 vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

Matson, J.
Dissenting, Frank T.
Gallagher, J., Nelson, J.

SYLLABUS

1. Jurisdictional presence of a foreign corporation is established only if the activities carried on within the forum are of such a quality and nature that it can be said that the foreign corporation has, as a matter of due process, established contacts, ties, or relations within the forum which give rise to privileges and obligations which reasonably obligate it to respond to any suit brought within the forum.

2. Regular and systematic solicitation of business within the state—which results in a continuous flow of the foreign corporation's products into the state through the channels of interstate commerce—when corroborated by other jurisdictionally significant acts or manifestations within the forum, establishes jurisdictional presence in compliance with the requirements of due process.

3. A nondiscriminatory state tax upon the net income of a foreign corporation engaged *solely* in interstate business, which is fairly apportioned to and measured by that part of the net income which is derived from business done within the state, contravenes neither the due process clause nor the

commerce clause, *where the incidence or subject of the tax is not the privilege of either engaging in, or continuing to engage in, interstate commerce,* but is instead those income-producing activities and transactions which, though indirectly related to interstate commerce, have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy the benefits and advantages of, a local business, and which as localized commerce ought to pay their own way and not place other local business at a competitive disadvantage.

4. The tax imposed under M.S.A. 290.03 not only complies with the requirements of due process but is also not in contravention of the commerce clause since it does not impose a burden upon, or discriminate against, interstate commerce.

5. The annual tax imposed by § 290.03 *upon the taxable net income* is not an excise or privilege tax measured by net income, but purely a net-income tax wholly unrelated to the privilege of engaging in interstate commerce.

6. A net-income tax, *the nonpayment of which involves no forfeiture or restriction upon the privilege of engaging in interstate commerce,* places no burden upon interstate commerce where it is levied only upon those interstate commerce transactions which have become localized within the state and have been completed so that the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.

7. Although a net-income tax may not be imposed by a state on the *privilege* of engaging in interstate commerce, the state is not precluded from imposing such a tax upon other activities and aspects of the taxpayer's business which have become localized within the state, even though the payment of such tax comes out of funds derived from the taxpayer's interstate business, provided, however, that the tax is

fairly apportioned and the burden thereof is reasonably related to the powers of the state and is nondiscriminatory.

Affirmed.

OPINION

MATSON, Justice.

Defendant taxpayer, a foreign corporation engaged exclusively in interstate commerce, appeals from a judgment in a proceeding by the State of Minnesota to collect income taxes—together with penalties and interest—upon that portion of the taxpayer's total net income which is allocable to Minnesota. The allocated tax relates to income derived solely from interstate commerce business conducted in this state.[1]

Three questions are presented on appeal:

(1) Does the taxpayer have sufficient contact with the State of Minnesota to make it amenable to service of process and subject to the jurisdiction of the Minnesota courts?

(2) Is M.S.A. 290.03 in conflict with, and thus invalid and void under, the due process clause of U.S. Const. Amend. XIV, and Minn. Const. art. 1, § 7, insofar as it imposes a tax on that portion of the net income of a foreign corporation arising out of sales assignable to and activities conducted within Minnesota?[2]

(3) Is § 290.03 in conflict with, and thus invalid and void under, the commerce clause, U.S. Const. art I, § 8, clause

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[1]This decision comes to the writer by reassignment.

[2]Section 290.03 reads as follows:

"An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include

3, insofar as it imposes a tax on that portion allocable to the taxing state of the net income of a foreign corporation whose business within the taxing state consists exclusively of interstate commerce?[3]

Taxpayer is an Iowa corporation engaged in the manufacture and sale of cement; its principal office and place of business is at Mason City, Iowa. Although the taxpayer maintains an office in Minneapolis and employs several representatives within the state who regularly and systematically solicit orders for the taxpayer's product, the taxpayer has never qualified under M.S.A. 303.03 as a foreign corporation authorized to transact business within this state.

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transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and,

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

[3]For convenience in comparing § 290.03 with § 290.02, the latter section is set forth below:

"An annual tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03 for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

"The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter."

Although in the course of its business in interstate commerce the taxpayer has for over 30 years systematically marketed a substantial part of its products in Minnesota, it has never filed income tax returns in this state. On refusal of the taxpayer to file income tax returns for the fiscal years 1933 through 1948 as required under § 290.03, the commissioner of taxation prepared returns on the basis of the best information available to him, filed these returns for the taxpayer, and assessed against the taxpayer the income taxes shown to be due by the returns. In the preparation of the returns, the commissioner used the three-factor formula prescribed by § 290.19 to determine what portion of the taxpayer's total net income should be allocated to Minnesota and subjected to the income tax imposed by this state. The following application of the formula defines each of the three factors and illustrates the result of their employment in determining the portion of the taxpayer's net income allocable to Minnesota for the year ending November 30, 1948:

(1) The ratio of the taxpayer's sales assignable to Minnesota to its total sales for the year wherever made	48.4493 percent
(2) The ratio of the taxpayer's total tangible property in Minnesota to its total tangible property used in the business that year wherever situated	.1142 percent
(3) The ratio of the taxpayer's total payroll in Minnesota to its total payroll for the entire business.	1.6484 percent
Total	50.2119 percent
Arithmetical Average	16.7373 percent

The percentages for the three factors were added together for a total of 50.2119 percent and then divided by 3 to give the final arithmetical average of 16.7373 percent which represents the percentage of taxpayer's income allocable to Minnesota for the 1948 fiscal year.[4] The average percentage when applied to taxpayer's 1948 total net income of $852,897.74—after first deducting therefrom $12,667.57 for non-apportionable income arising from interest and rents derived from property located outside Minnesota—shows for that year as apportionable to Minnesota a taxable net income of $140,631.84. Upon this latter sum of income, which is allocated to Minnesota pursuant to the three-factor formula, the commissioner assessed a tax of $8,370.53 plus certain penalties and interest. Total taxes, penalties, and interest assessed for the fiscal years 1933 to 1948 are $102,536.82.

I.

WAS TAXPAYER AMENABLE TO JURISDICTION OF MINNESOTA COURT?

1. We turn to the first issue to ascertain whether the taxpayer was juridically present in this state as to be amenable to the jurisdiction of our courts. Whether a foreign corporation domiciled in another state is jurisdictionally present so as to be subject to the jurisdiction of the Minnesota courts depends in each case upon the quality and nature of the activities which it carries on within our state.[5] What

[4]The 1948 fiscal year represents the year ending November 30, 1948.

[5]See, Schilling v. Roux Distributing Co., Inc. 240 Minn. 71, 59 N.W. (2d) 907; Hartmon v. National Heater Co. 240 Minn. 264, 60 N.W. (2d) 804; Continental C. & S. Management, Inc. v. American Broadcasting Co. 230 Minn. 217, 41 N.W. (2d) 263; Dahl v. Collette, 202 Minn. 544, 279 N.W. 561; Hutchinson v. Chase & Gilbert, (2 Cir.) 45 F. (2d) 139.

activity or combination of activities are necessary to constitute jurisdictional presence[6] of a foreign corporation domiciled elsewhere, in order to comply with the due process clause of Amend. XIV, cannot be summarized so as to provide an arbitrary test for all cases. Each case must be determined on its own peculiar facts to ascertain whether the corporation has carried on activities of such a quality and nature that it can be said that it has, as a matter of due process, established contacts, ties, or relations within the forum which give rise to privileges and obligations which reasonably obligate it to respond to any suit brought within the forum.

2. Without determining whether regular and systematic solicitation of business within the state—which results in a continuous flow of the corporation's products into the state through the channels of interstate commerce—alone and of itself—constitutes jurisdictional presence we need not here determine. It is clear, in any event, however, that such regular and systematic solicitation, when corroborated by other and additional corporate acts or manifestations within the forum, does establish jurisdictional presence in compliance with the requirements of the due process clause. We need not here attempt to define what other acts are sufficient to furnish corroboration since in the present case the corroborative acts are both abundant and jurisdictionally significant. The taxpayer herein not only has regularly and systematically solicited business which has brought through the channels of interstate commerce a continuous

[6]The symbolic terms *present* and *presence* as applied to a foreign corporation in ascertaining if state courts have jurisdiction, has been ably discussed in Hutchinson v. Chase & Gilbert, *supra*, and in Schilling v. Rouss Distributing Co., Inc. *supra*, and, therefore, need no discussion here.

flow into this state of its products, but as a further indication of its presence it has systematically carried on many additional activities and services which are summarized in the following four paragraphs.

FACTUAL SUMMARY OF TAXPAYER'S ACTIVITIES IN MINNESOTA

We turn to the facts as found by the trial court and as sustained by the evidence. For the convenience of its salesmen and customers, the taxpayer rents and maintains in Minneapolis an office which is used to some extent as a central office and serves as a clearinghouse for orders and complaints. A full-time secretary is employed in this office; two telephone lines are maintained; and it is listed in both telephone (alphabetical and classified indexes) and city directories. One of the district representatives is in charge of this office and, with the taxpayer's knowledge, holds himself out as district manager. In addition to office equipment, goodwill advertising and other material, taxpayer owns the automobiles driven by its Minnesota salesmen.

Taxpayer employs five sales representatives in Minnesota, two of whom work out of the Minneapolis office. The salesmen regularly and systematically solicit orders from eligible purchasers — building supply dealers, ready-mix operators, and large contractors. In addition, the salesmen regularly and systematically contact potential customers and users of cement products (inclusive of architects and building and road contractors) to induce them to buy from taxpayer's established local outlets and dealers, promote goodwill and furnish advertising materials to customers, entertain customers, and occasionally receive and forward complaints. *The*

flow of taxpayer's products into Minnesota constitutes about 48 percent of its sales volume.

All taxpayer's Minnesota employees are hired by supervisory personnel from its Mason City office, and no Minnesota employee has authority to hire or fire. Salesmen's territories are assigned by the Mason City office, and vacation schedules are established there. All orders are subject to acceptance by the office in Mason City, and credit extensions and collections are handled there, the salesmen having no authority to accept orders or extend credit.

The price of taxpayer's cement products is the delivered price to the customer, the sum of the base price plus the freight plus the package. Accordingly, the products are invoiced f. o. b. destination. Freight is prepaid by the taxpayer, and in no case can the customer purchase cement from taxpayer except at a delivered price nor, since taxpayer has no facilities for loading trucks, can the customer pick up cement at taxpayer's plant. Quotations giving both base and delivered price are sent directly to the customer from the Mason City office. Although the salesmen have no authority to give the customer a quotation, they do carry a rate book from which they regularly compute the delivered price to the customer without a quotation. On the request of one of taxpayer's dealers, quotations for specific projects are sent from Mason City to the contractor. Such a quotation cites the dealer's price (f. o. b. dealer's warehouse) to the contractor.

TAX DOES NOT VIOLATE DUE PROCESS CLAUSE

3. The imposition of a net income tax under Sec. 290.03 upon that portion of the taxpayer's net income which is allocated to Minnesota under the three-factor formula of Sec. 290.19 is not unconstitutional as violating the due process

clause of U. S. Const. Amend. XIV, or that of Minn. Const. art. 1, Sec. 7. A nondiscriminatory[7] state tax upon the net income[8] of a foreign corporation engaged *solely* in interstate business, which is fairly apportioned[9] to and measured by that part of the net income which is derived from business done within the state, contravenes neither the due process clause nor the commerce clause, where the incidence or subject of the tax is not the privilege of either engaging in, or continuing to engage in, interstate commerce, but is instead those income-producing activities and transactions which, though indirectly related to interstate commerce,[10] have become separated from the flow of that commerce and have become so localized within the state as to compete with, and enjoy the benefits and advantages of, a local business, and which as localized commerce ought to pay their own way

[7]See, United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328, 38 S. Ct. 499, 501, 62 L. ed. 1135, 1141, Ann. Cas. 1918E, 748, 750; Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87, 88, 68 S. Ct. 1475, 1478, 1479, 92 L. ed. 1832, 1839, 1840; Peck & Co. v. Lowe, 247 U.S. 165, 174, 175, 38 S. Ct. 432, 434, 62 L. ed. 1049, 1052; Atlantic Coast Line R. Co. v. Daughton, 262 U.S. 413, 422, 43 S. Ct. 620, 623, 67 L. ed. 1051, 1060; 1953 Wash. U.L.Q. 233, 255.

[8]See, Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165; United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 329, 38 S. Ct. 499, 501, 62 L. ed. 1135, 1141, Ann. Cas. 1918E, 748, 750.

[9]See, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256, 58 S. Ct. 546, 549, 82 L. ed. 823, 828.

[10]See, Atlantic Coast Line R. Co. v. Daughton, 262 U.S. 413, 422, 43 S. Ct. 620, 623, 67 L. ed. 1051, 1060; West Publishing Co. v. McColgan, 323 U.S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861; Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 156, 38 S. Ct. 295, 297, 62 L. ed. 632, 637.

and not place other local business at a competitive disadvantage.[11]

TAXPAYER'S LOCALIZED ACTIVITIES AND TRANSACTIONS WITHIN STATE SATISFY REQUIREMENTS OF DUE PROCESS

We can only conclude that the taxpayer has sufficient factual connections with localized activities and transactions within the state to comply with the requirements of due process. As already noted, the taxpayer maintains within the state several resident representatives who regularly and systematically solicit orders which are forwarded to the corporation's principal business office in the adjoining state for acceptance or rejection. These representatives, in addition to soliciting orders, entertain customers and furnish them with information, receive and forward their complaints, and furthermore, *contact prospective users of cement (inclusive of architects and building and road contractors) to induce them to buy cement through and from the taxpayer's established local outlets or dealers.*[12] In addition, the taxpayer maintains a local service office, permits its office manager and representative to hold himself out as its district repre-

[11] See, International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 349, 64 S. Ct. 1019, 1023, 88 L. Ed. 1313, 1319; Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S. Ct. 325, 83 L. ed. 272; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 259, 58 S. Ct. 546, 550, 82 L. ed. 828, 830; 1953 Wash. U.L.Q. 233, 242, 243, 253; 56 Dickinson L. Rev. 107, 109, 110; McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. ed. 565, 128 A.L.R. 876.

[12] See, Norton Co. v. Dept of Revenue, 340 U.S. 534, 539, 71 S. Ct. 377, 381, 95 L. ed. 517, 521. An analogous situation arose with respect to the Northwestern Consolidated Milling Company in Cheney Brothers Co. v. Massachusetts, 246, U.S. 147, 155, 38 S. Ct. 295, 297, 62 L. ed. 632, 637.

sentative, and otherwise engages in the many additional local activities *hereinbefore enumerated in a factual summary of taxpayer's activities in Minnesota.*

TAXPAYER RECEIVES EXTENSIVE BENEFITS OF STATE GOVERNMENTAL SERVICES AND ENJOYS THE PROTECTION OF THE STATE COURTS

Clearly, this is not a case where a state reaches beyond its borders and fastens its tax talons upon an event having no factual connection with transactions within its borders whereby it is unable to confer anything in return for the exaction.[13] Here instead the taxpayer is present through its extensive localized activities and enjoys, in return for any taxes exacted, the opportunities, protection, and benefits of a modern community serviced by a state government which maintains courts, police, roads, and other services of distinct advantage to the building and maintenance of the taxpayer's tremendous sales volume (48 percent of its total sales volume) through business outlets within the state. It is not amiss to observe that the taxpayer, or its immediate predecessor under a prior incorporation, has already had occasion to seek the benefit and protection of our courts.

III.

FINAL ISSUE—NOT IN CONTRAVENTION OF COMMERCE CLAUSE

4. The tax imposed under Sec. 290.03 not only complies with the requirements of due process but is also not in contravention of the commerce clause since it does not impose a burden upon, or discriminate against, interstate commerce.

[13] See, Hartman, State Taxation of Interstate Commerce, p. 117.

Tax enactments violate the commerce clause when they either profess to regulate interstate commerce, or affect it so directly as to amount to a regulation, or discriminate against it so as to place it at a disadvantage with intrastate commerce.[14] In the present case we have a net-income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against the free flow of interstate commerce.[15] It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative intent, or by operative effect be construed or classified as an excise, franchise, or privilege tax. It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes.* In this respect it involves no regulation of, or burden upon, interstate commerce.[16]

STATUTORY LANGUAGE PRECLUDES AN INTENT TO IMPOSE AN EXCISE TAX OR PRIVILEGE TAX

5. A comparison of Sec. 290.02 with the section with which we are here directly concerned, namely Sec. 290.03, is enlightening in disclosing the true nature of the tax.[17]

[14]See, McGoldrick v. Berwind-White Co. 309 U.S. 33, 60 S. Ct. 388, 84 L. ed. 565.

[15]Altman & Keesling, Allocation of Income in State Taxation, p. 29.

[16]Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165.

[17]For convenience in making a comparison, the two sections, Sections 290.02 and 290.03, are set forth in full in footnotes 2 and 3.

An examination of these sections discloses a clear distinction between the excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the state and the income tax imposed under Sec. 290.03. First, the arrangement of the statute in indicative of the legislature's intention to differentiate between these two types of taxes: Sec. 290.02 imposes an excise tax, but Sec. 290.03 imposes purely an income tax. That the *annual tax* imposed by Sec. 290.03 upon the *taxable net income* is not an excise or privilege tax measured by net income, but purely a net-income tax wholly unrelated to the privilege of engaging in interstate commerce, becomes clear when we consider the character of the specifically designated types of taxpayers to which it equally and uniformly applies. Clearly, paragraphs (1), (2), (3), and (4) of Sec. 290.03 must be construed together since they relate to the imposition of the same kind of tax on four different classes of taxpayers, namely, on domestic and foreign corporations engaged exclusively in foreign or interstate commerce under paragraph (1); on resident and non-resident individuals under paragraph (2); on estates of decedents dying domiciled within or without the state under paragraph (3); and on trusts created by resident or non-resident persons or by domestic or foreign corporations under paragraph (4). Since the annual net-income tax imposed on individuals under paragraph (2) cannot by any legal legerdemain be construed as an excise or privilege tax, the same yardstick of meaning must be applied to the tax imposed under paragraph (1) upon foreign corporations engaged exclusively in interstate commerce. A similar comparison of paragraphs (3) and (4) with paragraph (1) corroborates this conclusion.

Secondly, the distinction in the nature of these taxes is further emphasized by the provisions of Sec. 290.04, subd. 1, which establishes that liability for the excise tax—although measured by income—arises on the first day of the taxable year, while liability for the income tax arises concurrently with the receipt or accural of income during the taxable year.

TAX IS NONDISCRIMINATORY AND SUBJECT TO JUDICIAL REVIEW

The tax is also nondiscriminatory. *It applies equally to all taxpayers, resident or nonresident, and whether they are engaged in either interstate or intrastate commerce. Significantly Minnesota, in dealing with resident and domestic taxpayers located within its borders and doing business partly within and partly without the state, imposes the tax only on that portion of the income allocable to earnings produced within this state.* As applied to nonresident taxpayers engaged in interstate commerce, it is confined to that portion of their income earned from business activities which are fairly apportioned to, and localized within, the state. It is not an arbitrary imposition since the taxpayer has the opportunity of voluntarily preparing and filing his own tax return according to the information which he himself possesses. If any error is thought to occur in the levy, measure, or the amount of the tax as based on his own return, or upon a return prepared for him by the tax commissioner, he may, like any resident taxpayer, petition the state Board of Tax Appeals for relief and after that he has a further right of appeal to this court.

TAX IS FAIRLY APPORTIONED TO INTRASTATE NET-INCOME SOURCES AND DOES NOT IMPOSE A MULTIPLE TAX BURDEN ON INTERSTATE COMMERCE

Taxpayer contends that the tax before us is invalid for the reason that it imposes a multiple tax burden upon its interstate business. Although a tax imposed upon gross receipts or other incidents may be invalid for this reason where not fairly apportioned,[18] such a tax is not invalid if it is fairly *apportioned* to the commerce carried on within the taxing state. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L. ed 823. Likewise, a tax imposed upon net income, if fairly apportioned to sources derived from within the taxing state, does not contravene the requirement of due process even though the taxpayer may be domiciled in another state.[19] Moreover, as hereinafter shown, such a tax does not violate the commerce clause although the income or a part of the income taxed is derived from interstate commerce.[20] The tax before us now is a tax upon net income

[18]Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913, 82 L. ed. 1365; Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S. Ct. 325, 83 L. ed. 272; Case of State Freight Tax, 82 U.S. (15 Wall.) 232, 21 L. ed. 146; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L. ed. 823.

[19]Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45 65 L. ed. 165; New York ex rel. Whitney v. Graves, 299 U.S. 366, 57 S. Ct. 237, 81 L. ed. 285; Altman v. Keesling, Allocation of Income in State Taxation, p. 29.

[20]United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S. Ct. 45, 65 L. ed. 165; Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, 64 L. ed. 445; Altman & Keesling, Allocation of Income in State Taxation, p. 29.

and it is fairly apportioned to the net profit derived from taxpayer's business activities carried on in this state. It is therefore not invalid as imposing a multiple burden upon taxpayer's interstate business.

MERE POSSIBILITY THAT IOWA MAY ATTEMPT TO TAX ENTIRE INCOME OF TAXPAYER DOES NOT INVALIDATE MINNESOTA TAX

We have, however, the suggestion, although there is no support for it in the record, that Iowa, as the domiciliary state, may attempt to impose a tax upon taxpayer's entire net income wherever earned. Most states, including Minnesota, however, permit their domiciliaries to apportion the net income derived from sources within the state and thereby excuse payment of a tax on net income derived from out-of-state sources.[21] Where, however, a domiciliary state does not voluntarily permit the apportionment of the total net income of the taxpayer, the United States Supreme Court has, by its treatment of a potential double tax burden in another situation, indicated that it may require the domiciliary state to permit apportionment. In the analogous situation the court, in dealing with an ad valorem tax, has held that a state other than the corporate domicile may impose a tax upon the taxpayer's instrumentalities utilized in interstate commerce. Where, however, a tax is imposed by two or more states on an apportionment basis, the court declared that the *domiciliary* state is precluded from taxing all of taxpayer's property.[22] If the domiciliary state is required

[21]Altman & Keesling, Allocation of Income in State Taxation, p. 31; M.S.A. 290.19.

[22]Standard Oil Co. v. Peck, 342 U.S. 382, 72 S. Ct. 309, 96 L. ed. 427; Braniff Airways v. Nebraska Board, 347 U.S. 590, 74 S. Ct. 757, 98 L. ed. 967.

to apportion in the case of an ad valorem tax, there is no reason why it may not be required to do so with respect to a tax imposed upon taxpayer's net income.

A NET-INCOME TAX IS NOT A BURDEN ON INTERSTATE COMMERCE

6. Clearly, a net-income tax places no burden upon interstate commerce. *The tax is levied after the interstate commerce transactions localized within the state have been completed, and after all expenses are paid and losses adjusted, and after the taxpayer, as the recipient of the remaining net income, is free to use it as he chooses. Thus the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.* See Peck & Co. v. Lowe, 247 U.S. 165, 175, 38 S. Ct. 432, 434, 62 L. ed. 1049, 1052. No longer may it be doubted that a tax may be levied on net income derived wholly from operations in interstate commerce, although a tax on that commerce is forbidden.[23]

In McGoldrick v. Berwind-White Co., 309 U.S. 33, 46, 60 S. Ct. 388, 392, 84 L. ed. 565, 570, 128 A.L.R. 876, 880, the court said:

> "* * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which never-

[23] United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U.S. 37, 57, 40 S. Ct. 221, 227, 64 L. ed. 445, 459; see, McGoldrick v. Berwind-White Co., 309 U.S. 33, 47, 60 S. Ct. 388, 392, 84 L. ed. 565, 570, 128 A.L.R. 876, 880; Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 656, 62 S. Ct. 857, 862, 86 L. ed. 1090, 1097; West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1378, 90 L. ed. 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861.

theless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation."

SPECTOR MOTOR SERVICE DECISION DISTINGUISHED

7. Taxpayer contends, however, that since the rendition of the decision in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. ed. 573, no tax, even though it be fairly apportioned and nondiscriminatory, may be levied on the net income of a foreign corporation engaged *exclusively* in interstate commerce. It is the position of the taxpayer that such a tax may be levied only in those cases where the foreign corporation is engaged in both intrastate and interstate commerce. We cannot agree with this interpretation of the Spector case. The Spector case did not turn on the fact that the foreign corporation was *solely* engaged in interstate commerce. The nub of the decision is that a net-income tax, even though it be fairly apportioned and nondiscriminatory, may not be imposed on the *privilege* of engaging in business that is exclusively interstate in character. The Connecticut Supreme Court construed its statute as involving a direct imposition of the tax upon the *franchise or privilege* of engaging in interstate commerce. The United States Supreme Court clearly accepted this construction as controlling its interpretation. This is not unusual. In Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 84, 85, 68 S. Ct. 1475, 1477, 92 L. ed. 1833, 1838, the court expressly declared

that it was bound by the construction of a state statute by the state court. Although the United States Supreme Court has on occasion looked behind a state court's holding that a tax is not a burden upon interstate commerce, *it has not done so where the state court has by its construction admitted or declared the tax to be a burden upon that commerce.* Since the incidence of the tax in the Spector case was the *privilege* itself of engaging in interstate commerce, it fell before the commerce clause. The court carefully distinguished those cases in which, as an exception to the general rule that no tax may be levied upon the *privilege* of engaging in interstate commerce, a state, where a taxpayer in engaged in both intrastate and interstate commerce, is permitted to tax the *privilege* of carrying on intrastate business and, within reasonable limits, is permitted to apply a fair proportion of the tax to the taxpayer's business which is done within the state. The court refused to extend the application of these hybrid cases to a taxpayer, like Spector, who is engaged exclusively in interstate commerce. The majority expressly stated that (340 U.S. 610, 71 S. Ct. 513, 95 L. ed. 579) "the federal *privilege* of carrying on exclusively interstate commerce" must be kept "free from state taxation." (Italics supplied.)

The court, in the Spector case, carefully pointed out that whether a state may validly make interstate commerce pay its own way depends first of all upon the constitutional channel through which it attempts to do so, citing Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91 L. ed. 265, and McLeod v. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023, 88 L. ed. 1304. Apparently in an effort to prevent misunderstanding of the rule of its holding, and for the purpose of indicating

that a constitutional channel is available to the states, the court said (340 U.S. 609, 71 S. Ct. 512, 95 L. ed. 578):

> "* * * *The State is not precluded from imposing taxes upon other activities or aspects of this business* which, unlike the *privilege* of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." (Italics supplied.)

It follows that the Spector decision makes it reasonably clear that there is a constitutional channel for making interstate commerce pay its own way and that this channel gives the state a right to impose taxes upon other activities and aspects of the interstate commerce business which, unlike the *privilege* of doing interstate business, are subject to the sovereign power of the state despite the fact that such taxes may be derived out of income from interstate business.

ALPHA PORTLAND CEMENT CO. DECISION DISTINGUISHED

The Spector decision, in support of its holding that a state may not tax the *privilege* of carrying on a business that is exclusively interstate in character, cites Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. ed. 916, wherein an attempt was made to impose an excise tax upon the *privilege* of engaging in a business solely interstate in character. The Alpha case does nothing more than emphasize the rule that taxes upon the *privilege* of doing interstate business violate the commerce clause.

CHENEY BROTHERS CO. V. MASSACHUSETTS SUPPORTS VALIDITY OF TAX HEREIN

In Cheney Brothers Co. v. Massachusetts, 246, U.S. 147, 38 S. Ct. 295, 62 L. ed. 632 (cited in the Alpha case), involving consideration of the validity of an excise tax imposed upon seven foreign corporations, each differently situated, we have a good illustration of the principle that a state may impose a valid tax if the proper constitutional channel is selected. One of the foreign corporations involved therein was the Northwestern Consolidated Milling Company, which like the instant taxpayer, had localized its business within the state. In upholding the validity of the tax upon this corporation, the court said (246 U.S. 155, 38 S. Ct. 297, 62 L. ed. 637):

> "This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. *Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another,*—and may be taxed by the State, regardless of the motive with which it is conducted." (Italics supplied.)

In the case at bar we also have salesmen who call upon the users of cement to induce them to give their business to the local dealers who handle the taxpayer's product.

WEST PUBLISHING CO. V. McCOLGAN SIMILARLY DISTINGUISHES SPECTOR AND ALPHA CASES AND SUPPORTS VALIDITY OF INCOME TAX ON FOREIGN CORPORATIONS WHERE NET INCOME IS THE SUBJECT AS WELL AS THE MEASURE OF THE TAX

That our interpretation of the Spector and Alpha cases is correct is further illustrated by a comparatively recent decision involving facts substantially similar to those of the case at bar, namely, West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1378, 90 L. ed. 1602, affirming 27 Cal. (2d) 705, 166 P. (2d) 861. The West case has been well summarized as follows:

> "• • • this company was in the law book publishing business, a Minnesota corporation. The company shipped books and other publications into California pursuant to orders taken by its salesmen who devoted their full time to their jobs in California. These employees had space in lawyer's offices in exchange for the use of books stored there. The California employees were authorized to and did receive payments on orders, collected deliquent [sic] accounts and made adjustments on complaints of customers.
>
> "The State of California cognizant of the fact that a state may not exact a tax for the *privilege* of doing an exclusively interstate business, imposed an income tax on those corporations not subject to its franchise tax. It made net income the subject as well as the measure of its *Corporation Income Tax*. It limited the measure of the tax to income from California sources which was understood to mean income from sources of books and periodicals delivered in California. The California Supreme Court sustained the assessment holding that 'a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce does not conflict with the commerce clause.' The U.S. Supreme Court unanimously affirmed this decision by a per curiam opinion." (Italics supplied.)[24]

[24] Kraus, *The Implications of the Spector Motor Service Case*, 56 Dickinson L. Rev. 107, 112.

COMPARISON OF WEST WITH SPECTOR AND ALPHA DECISIONS

In the Spector and Alpha cases, both involving foreign corporations engaged exclusively in interstate commerce, the tax was held invalid because it was imposed directly on the *privilege* of doing that business. In the West case, however, the tax was valid because it was a tax on the net income from business localized within the state and not a tax on the *privilege* of engaging in interstate commerce. In connection with the West case, it is significant to note that the California statutory scheme of taxation is similar to that of Minnesota. See Appendix at the end of this opinion.[25]

In the light of the intent, as well as the carefully restricted impact, of our state statutes, as applied to taxpayer's extensive localized activities within Minnesota, we can only conclude that the net-income tax imposed under § 290.03, pursuant to the decisions of the United States Supreme Court, does not contravene the due process clauses of either the Federal or the State Constitutions and does not conflict with the commerce clause.

The trial court is affirmed.

Affirmed.

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[25]The relatively recent Pennsylvania Supreme Court decision in Commonwealth v. Eastman Kodak Co., 385 Pa. 607, 124 A. (2d) 100, is neither controlling nor in point. In that case the incidence of the tax was held to be the franchise or privilege of doing interstate commerce. The Kodak Company did not maintain a service office within Pennsylvania for the convenience of its customers and salesmen. Furthermore, the Kodak Company did not have a local manager; did not contact prospective users of its products to persuade them to patronize its local dealers; and did not, in any material degree, carry on the systematic local activities characteristic of the taxpayer herein. In the instant case the taxpayer is present in Minnesota through its extensively localized activities and these activities —unlike those in the Pennsylvania case—provide the necessary incidence for the tax.

APPENDIX TO OPINION

In connection with the West decision, it is interesting to note that California's statutory scheme of taxation under its Corporation Income Tax Act of 1937 and Bank and Corporation Franchise Tax Act is very similar to Minnesota's. The California statute provides:

> "There shall be levied, collected and paid for each taxable year, a tax * * * upon the net income of every corporation derived from sources within this State * * *. Income from sources within this State includes income from tangible or intangible property located or having a situs in this State and income from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce." Calif. Stat. 1937, c. 765, sec. 3.

The act excepts from its provision any income included in the measure of the corporate excise tax. The California Supreme Court's determination that the tax as valid was affirmed by the Supreme Court of the United States. West Publishing Co. v. McColgan, 27 Cal. (2d) 705, 166 P. (2d) 861, affirmed, 328 U.S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603.

On the other hand, Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508; 95 L. Ed. 573, was concerned with the construction of a statute which, on its face, professed to impose an excise tax for the privilege of transacting business within the state. The Connecticut Corporation Business Tax Act of 1935 imposed, with certain exceptions not involved here, on every corporation carrying on business within the state—

> "* * * a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income * * * received by such corporation * * * from business transacted within the state * * *." Conn. Cum. Supp. to Gen. Stat. 1935, sec. 418c.

NELSON, Justice (dissenting.)

I respectfully dissent from the conclusions reached in the majority opinion on defendant's tax liability.

It is undisputed that the taxpayer is an Iowa corporation domiciled in that state; that its business is the manufacture and sale of cement and cement products; and that it maintains its home and principal business offices, as well at its manufacturing plant, at Mason City, Iowa.

Taxpayer has never qualified under M.S.A. 303.03 as a foreign corporation authorized to do business in the State of Minnesota, nor does the record indicate that the state has ever demanded such qualification or compliance with that statute. There is no indication from the record that this state could demand such compliance nor that it could deny defendant the right to freely engage in interstate commerce within its borders.

Taxpayer admits that, while engaged in interstate commerce in the manufacture and sale of its products, it has over a period of approximately 30 years found a market for a large amount of its products in Minnesota, but alleges that it has operated in the same manner in Iowa, Nebraska, North Dakota, South Dakota, and Wisconsin. Taxpayer has never filed income tax returns in this state. The state commissioner of taxation determined to claim part of the income earned by taxpayer as taxable by Minnesota, and upon taxpayer's refusal to file returns, he prepared the returns in his own office on the basis of information available to him and caused them to be filed.

The Commissioner used the so-called three-factor formula described in sec. 290.19 in determining the portion of defendant's overall net income which was to be allocated to Minne-

sota and subjected to the income taxes imposed by this state. The three factors specified pursuant to the statutory formula were: (1) The ratio of the taxpayer's sales made in Minnesota during the year to its total sales for the year wherever made; (2) the ratio of the taxpayer's total tangible property used in the business that year to the total tangible property wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year.

The figures arrived at in the commissioner's returns were demanded from taxpayer under §290.03 and Minnesota Income Tax Regulations, Reg. 2003 (1), as applicable to income tax on corporations.[26] The total alleged tax deficiency, if collectible, is not in dispute.

During the relevant business years taxpayer maintained only one office in this state. That office, located in Minneapolis, was occupied under a lease negotiated and paid for from the home office at Mason City, Iowa. Taxpayer did not own or occupy a warehouse or storage or manufacturing plant in this state. It owned no real estate here, and its only personal property in this state was its salesmen's automobiles, its office furniture, and a small amount of supplies and good will advertising material. The Minneapolis office was a sales office where taxpayer's salesmen met customers. The

[26]Reg. 2003 (1) of Minnesota Income Tax Regulations 1955 (income tax on corporations) provides:

"All corporations, domestic or foreign, whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M.S.A. 290.03 (1). This provision requires the imposition of a tax on the net income from Interstate commerce or foreign commerce assignable to Minnesota."

office consisted of three small rooms and contained three desks, two filing cabinets, a typewriter, and some chairs. All personal property including salesmen's automobiles and office supplies except postage stamps were requisitioned from the home office and were bought and paid for there.

During the years involved five salesmen were employed in this state. Two operated from the Minneapolis office and the other salesmen operated directly out of their homes at different points in the state. The only other employee was a secretary who worked at the Minneapolis office. All these employees were hired by supervisory personnel at taxpayer's home office. At no time did any of the above employees possess or exercise authority to hire or fire other employees, nor did the employees have authority to purchase supplies other than postage stamps. Taxpayer did not maintain a bank account in this state, and all salaries paid Minnesota employees were fixed by the sales manager at Mason City and paid directly from the home office. Territories for each salesman were allocated at the home office, and no salesman had authority to reallocate. Customer entertainment expenses incurred in this state were paid directly from the home office. Employees were compensated by salary only, without provision for commissions.

The sales procedure was one of solicitation and taking orders. The salesman received the buyer's order which they forwarded to the home office. There the order was examined before acceptance. Buyer's credit was subject to home office approval. If the order was accepted, the buyer was sent an acknowledgment from the home office and the cement product shipped directly to the buyer by rail, f.o.b. Mason City, Iowa. All merchandise was invoiced and shipped from Mason City

directly to the buyer. All price quotations and changes thereof were sent directly to the customer from the home office. Prices were quoted at millsite rate at Mason City, Iowa, plus, for the buyer's convenience, the freight to the buyer's place of business. The salesmen were required to transmit all orders received to the home office daily. All contracts were executed at the Mason City office and then sent directly to the customer. Credit extensions and collections were handled only at the home office. The salesmen were without authority to accept or reject a customer's order or to approve his credit. The buyer's claim for loss or damage was handled only by the home office. Any claims presented to the salesmen were transmitted to the home office for disposition. The authority of the salesmen was limited to the solicitation of sales and promotion of good will, and for all practical purposes they were devoid of any managerial responsibility.

There is testimony that one salesman had at times held himself out as defendant's district manager. The record indicates doubt whether this was with or without taxpayer's knowledge.

Based upon taxpayer's activities as disclosed by the record connected with its operations in Minnesota, the trial court found that those activities consisted of a regular and systematic course of solicitation of orders for the sale of merchandise, such orders being subject to approval, acceptance, filling and delivery by the taxpayer from its home office at Mason City, Iowa. The court found that a predecessor of defendant had resorted to the courts of Minnesota to enforce its contract on one occasion. The record does not disclose that the present defendant has at any time resorted to the courts of this state to enforce its contracts. The trial court in its

memorandum, which was made a part of the decision in this case, stated *"Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both."* (Italics supplied.) The court below also characterized taxpayer's activities in this state as an integral part of its interstate activities, with all revenues received by it from customers' sales in Minnesota resulting from its operation in interstate commerce.

The trial court, nevertheless, by its conclusions of law, determined in effect that taxpayer's activities in Minnesota were sufficient in the local field to render it subject to the court's jurisdiction and moreover subject to taxation based upon apportionment under the formula applied to determine taxpayer's net income from its Minnesota activities. Based upon the findings made, it concluded that the tax as assessed, and if collected, does not contravene the due process clause of either U. S. Const. Amend. XIV, or Minn. Const. art. 1, §7, nor does the tax as assessed conflict with or violate the commerce clause, U. S. Const. Art. 1, §8, clause 3.[27]

Even though the position of the taxpayer herein that mere solicitation does not constitute sufficient doing of business to

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[27] U. S. Const. art I, §8, clause 3, provides:

"The Congress shall have power:

* * * * * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

U. S. Const. Amend. XIV, §1, provides:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. * * *.

Minn. Const. art. 1, §7, provides in part:

"No person shall * * * be deprived of life, liberty or property without due process of law."

subject defendant corporation to suit is somewhat persuasive, we take no issue with the majority opinion on its statement relative to service of process or the question whether the courts of Minnesota acquire jurisdiction of taxpayer.

Difficulties are encountered because of the natural inclination to equate amenability to service of process to jurisdiction to tax. Such, however, is not the case. Amenability to suit and imposition of the taxing power are distinct problems. While the service of process may well subject the taxpayer corporation here involved to jurisdiction in personam, there remains nevertheless the question of jurisdiction of the thing as distinguished from the jurisdiction of the person, even though in International Shoe Co. v. Washington, 326 U. S. 310, 321, 66 S. Ct. 154, 161, 90 L. Ed. 95, 105, the United States Supreme Court stated:

> "* * * The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax."

We consider the important questions on this appeal to be (1) whether M.S.A. 290.03 is in conflict with and violative of the due process clauses of U. S. Const. Amend. XIV, and Minn. Const. art. 1, §7, insofar as it seeks to impose a tax on income of a foreign corporation which arises wholly out of sales and activities carried on and consummated exclusively in interstate commerce and, except for continuous and systematic solicitation on the part of its salesmen and their activities within the state, otherwsie conducted exclusively without and beyond the borders of the state of Minnesota, and (2) whether §290.03 is in conflict with and violative of the commerce clause, U. S. Const. art. I, §8, clause 3, insofar as it seeks to impose a tax on the net income of taxpayer, a foreign

corporation, whose business activities in this state were an integral part of its interstate activities and whose business consists exclusively of interstate commerce.

Deciding that the taxpayer, a foreign corporation, can be sued in Minnesota, does not decide that it is subject to being taxed in this state. The question of the application of the taxing power must be decided upon the merits. See, Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291; 18 Fletcher, Cyclopedia of Corporations (Perm. ed.) §8712. The operating incidence within the taxing state of the foreign corporation is controlling as to liability to taxation or other burdens which may be imposed upon interstate commerce measured by the multiple-burden test.

The claimed activities of the taxpayer's soliciting salesmen allegedly give rise to the tax issue here. Jurisdiction in personam, not offensive to traditional notions of fair play, allows the trial court to proceed to decide the issues arising in the case on its merits.

Section 290.03, upon which the state relies for the collection of the taxes assessed against the taxpayer,[28] in fact provides for an annual tax without designating the type of tax. The tax is measured by the net income according to the apportionment formula provided for in §290.19. See, Western Auto Supply Co. v. Commr. of Taxation, 245 Minn. 346, 71 N.W. (2d) 797. Although the tax is measured by net income, and the commissioner of taxation and the taxpayer corporation do not contend that it is anything but an income tax, it has elements of an excise tax.

An excise tax is synonymous with a privilege tax. American Airways v. Wallace (M. D. Tenn.) 57 F. (2d) 877. The mere fact that the tax is measured by a percentage of net income does not prevent it from being an excise or privilege tax.

[28]See footnote 26.

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165.

An excise tax is an indirect charge for the privilege of following an occupation or trade, or carrying on a business; while an income tax is a direct tax imposed upon income and is as directly imposed as is a tax on land. United States v. Philadelphia, B. & W. R. Co. (E.D. Pa.) 262 F. 188. The constitutionality of the tax depends upon the substance of the statute and the real character of the tax, rather than upon the name given the tax by the legislature.

A tax measured by the income or earnings of a corporation may be in fact an excise or franchise tax, although the statute imposing the same does not so denominate it. Security Sav. & Commercial Bank v. District of Columbia, 51 App. D. C. 316, 279 F. 185.

However, determining that a tax is an excise tax on the privilege of doing business is not to decide the case. Practical operation, not descriptive labels, of the challenged tax statute must and will determine validity of application. Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613. Mr. Justice Reed in a footnote in his dissent in that case noted (337 U. S. 677, 69 S. Ct. 1272, 93 L. Ed. 1626):

> "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned." [29]

[29] As previously stated: "This court has repeatedly adjudged that * * * the judiciary will not regard mere forms, but will look through the forms to the substance of things." Western Union Tel. Co. v. Kansas, 216 U.S. 1, 27, 30 S. Ct. 190, 197, 54 L. ed. 355, 366.

In one of the opinions appearing in connection with the litigation of Spector Motor Service v. O'Connor (2 Cir.) 181 F. (2d) 150, 156, the court reviewed its function concerning state taxation of interstate commerce as follows:

> "We should not be understood as claiming that the constitutionality of a tax should depend upon the name the legislature has given it. * * * Hence we do not suggest that the tax is automatically constitutional merely because it is measured by net income, and a net income tax has been held to be an indirect burden. *Rather we should look to the actual operation of the tax and decide whether it discriminates against interstate commerce, whether it is unduly burdensome to interstate commerce, whether it attempts to reach activities outside the borders of the state, and whether it is susceptible of being repeated by any other state. If these questions are answered in the negative, if the tax is a fair and a just attempt to make all commerce intrastate and interstate, bear its share of the costs of government, then the tax should be held valid.*" (Italics supplied.)

See, also, Spector Motor Service v. Walsh (2 Cir.) 139 F. (2d) 809, including dissent by Judge Learned Hand.

A state's area of taxation is limited by its geographical borders. Generally, where interstate commerce is involved, the general business situs of taxpayer being wholly in another state, property or the existence of business activities sufficient in the local field to be designated or classified as intrastate commerce must be found within the taxing state, affording an appropriate channel through which to tax, before that state may levy a tax which even indirectly affects the business of a foreign corporation. Where taxpayer is engaged both in interstate and in intrastate commerce, a state may tax the privilege of carrying on intrastate business and, within rea-

sonable limits, in order to arrive at the measure of business within the taxing state, may compute the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state and, as a basis for arriving at its apportionment, include in its calculations both interstate as well as intrastate business. It may be said that it is in substance the rule that the interstate commerce clause prohibits the state which is not the domiciliary one from taxing in any manner the act of engaging in interstate commerce within its limits and also from taxing property engaged in interstate commerce, when it may legally do so, at a higher rate than any other property. It would appear to be generally understood that every form of taxation directly imposed upon interstate or foreign commerce is prohibited to the states beyond all controversy and that the only question which arises in this class of cases is how far a state tax may incidentally affect the free flow of foreign or interstate commerce without falling within the inhibition implied from the exclusive power of Congress, to which the Constitution commits the regulation of commerce with foreign nations and among the several states. It would be a simple matter if the exact limits of the power of a state to levy taxes which incidentally affect interstate commerce were capable of precise definition. Decisions must be made depending upon the facts in each case since almost every tax imposed by a state in some degree affects interstate commerce. Always, the important question is whether interstate commerce is affected to an unconstitutional extent and whether the degree to which it is affected constitutes an undue burden upon such commerce.

In Alpha Portland Cement Co. v. Commonwealth, 248 Mass. 156, 142 N. E. 762, it was held by the state court that a state may lawfully impose an excise tax on a foreign corpora-

tion engaged exclusively in interstate commerce provided the tax is measured by net income from the business transacted in the taxing state. It would appear that the Massachusetts court in the foregoing case and in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, 139 N. E. 158, based its decision upon the theory of remuneration for local protection and benefits without reference to the distinction drawn in some cases between local taxation of foreign corporations engaged exclusively in interstate commerce and those engaged in both interstate and intrastate commerce.

The United States Supreme Court, however, in Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, reversed the decisions of the Massachusetts court in both cases, holding that the imposition of the tax was an unconstitutional burden on interstate commerce. The United States Supreme Court in that decision in effect denied altogether the power of the state to impose a tax in any form on a corporation engaged exclusively in an interstate business. As that court is the final arbiter of questions of the character involved, it must appear somewhat obvious that, until that decision is overruled or limited by the United States Supreme Court itself, it has thereby settled the question, not only of the power of a state to impose an excise tax, or even a net-income tax if the tax be denominated as such, on foreign corporations engaged exclusively in interstate commerce measured by income from business within the state, but of the power to impose a tax in any form on such corporations.[30]

It was laid down as a general rule in Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, that a state taxing statute which discriminates against interstate

[30] See, Annotation, 44 A.L.R. 1228 to 1231.

commerce is invalid. We think it well settled under the constitutional provisions involved here that interstate or foreign commerce may not be taxed by a state and that a state may not impose upon foreign corporations a tax for the privilege of engaging in such commerce except where the local incidence of the operations in the taxing state lays a basis for classifying such local operations as intrastate activity,[31] or in essence as intrastate commerce.

Upon a state of facts similar to those of the instant case, the United States Supreme Court in Cheney Brothers Co. v. Massachusetts 246 U.S. 147, 153, 38 S. Ct. 295, 296, 62 L. ed. 632, 636, said:

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. • • • *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.*" (Italics supplied.)

The Supreme Court of the United States in holding that the attempted imposition of the income tax was void and repugnant to the commerce clause of the United States Constitution in the Alpha Portland Cement Co. case, relying on its earlier decision in the Cheney Brothers Co. case, said (268 U.S. 219, 45 S. Ct. 481, 69 L. ed. 924):

> "The excise challenged by plaintiff in error is not materially different from the one declared unconstitu-

[31] Also, see, Annotations, 105 A.L.R. 11 to 67, and 117 A.L.R. 444 to 446.

tional in Cheney Brothers Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the State. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

Thus, the United States Supreme Court struck down the attempted imposition of an *income tax* as unconstitutional when applied to a foreign corporation doing only interstate business in the taxing state, where no local incidence follows from the operational activities of a foreign corporation giving rise to intrastate business or commerce, holding, in that situation, that a state may not tax the interstate business of a corporation of another state.[32] The principles of the latter cases were followed in Spector Motor Service v. O'Connor, 340 U.S. 602, 71 S. Ct. 508, 95 L. ed. 573.

The issue before the United States Supreme Court in that case had been rather distinctly stated by Judge Learned Hand in his dissenting opinion in Spector Motor Service v. Walsh, (2 Cir.) 139 F. (2d) 809, 822, where he said:

"* * * we have before us in the barest possible form the effort of a state to levy an excise directly upon the privilege of carrying on an activity which is neither derived from the state, nor within its power to forbid."

In Norton Co. v. Dept. of Revenue, 340 U.S. 534, 537, 71 S. Ct. 377, 380, 95 L. ed. 517, 520, the United States Supreme Court said:

"Where a corporation chooses to stay at home, in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office

[32] Western Union Tel. Co. v. Kansas, 216 U.S. 1, 30 S. Ct. 190, 54 L. ed. 355.

> for acceptance, filling, and delivery back to the buyer, it is obvious that *the State of the buyer has no local grip on the seller.*" (Italics supplied.)

In Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 72 S. Ct. 424, 96 L. ed. 436, Mr. Chief Justice Vinson speaking for the Court made it clear *that a tax, the operational incidence of which caused it to fall upon solicitation of interstate business, was a tax on interstate commerce itself.* The court then stated why the tax would not be permitted to conflict with the constitutional mandate on the regulation of commerce between the states (342 U.S. 395, 72 S. Ct. 428, 96 L. ed. 441):

> "* * * The Commerce clause created the nationwide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

Other cases that bear with considerable force upon the in- Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. ed. 439; Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 69 S. Ct. 1264, 93 L. ed. 1613; Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. ed. 993; McLeod v. Dil worth Co., 322 U.S. 327, 64 S. Ct. 1023, 88 L. ed. 1304; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396, 98 L. ed. 583; Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91 L. ed. 265; Adams Mfg. Co. v. Storen, *supra;* Owin, White & P., Inc. v. Henneford, 305 U.S. 434, 59 S. Ct.

325, 83 L. ed. 272; Nippert v. Richmond, 327 U.S. 416, 66 S. Ct. 586, 90 L. ed. 760.[23]

The commerce clause of the Federal Constitution controls the respective powers of the state and Federal governments in connection with interstate commerce. The commerce clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but it is a commitment to it by the Constitution to regulate commerce with foreign nations and among the several states. It also creates an area of trade free from interference by the states, and none is permitted to take any action which may be deemed to impede the free flow of trade between states. We think the record clearly indicates that taxpayer is exclusively engaged in interstate commerce, subject only to a determination of the question whether the local incidence of its operations in Minnesota provide a basis for the assessment of the tax which the state seeks to impose and that under the decisions we have just referred to, to the extent that the taxpayer's activities are exclusively in interstate commerce, there will be immunity from state taxation.

The governing principles, which were early stated in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. ed. 579; Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 6 L. ed. 678; and repeated in Robbins v. Shelby County Taxing Dist. 120 U.S. 489, 7 S. Ct. 592, 30 L. ed. 694, indicate that the taxing power of the states has for the most part been closely scrutinized in the commerce field, while Congress, which has

[23] Since the decision in the Spector Motor Service case, several of the highest state courts have ruled upon local taxes laid on exclusively interstate business declaring them void. Mississippi River Fuel Corp. v. Hoffman, 4 Ill. (2d) 468, 123 N.E. (2d) 503; Gross Income Tax Division v. Surface Combustion Corp. 232 Ind. 100, 111 N.E. (2d) 50; Roy Stone Transfer Corp. v. Mesner, 377 Pa. 234, 103 A. (2d) 700.

the power to lessen or take away immunity in the interstate commerce field in state taxation, has been slow to interfere, except in a limited way and in limited and prescribed fields with the added burden light and controllable, where to do so would impede the free flow of trade between the states. A burden on interstate commerce is no less objectionable because it is imposed by a state under the taxing power rather than under the state police power. Freeman v. Hewit, *supra*. Interstate commerce should bear its fair share of the tax load. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S. Ct. 546, 82 L. ed. 823. However, to suggest that a tax on interstate commerce is valid because a similar tax is placed on local trade is to disregard the commerce clause. Freeman v. Hewit, *supra*. So long as the commerce clause is recognized as preventing any interference with interstate trade, there will be discussion concerning the conflicting claims of the state taxing power and the commerce clause. See, Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 Wash. U.L.Q. 233; Kraus, *The Implications of the Spector Motor Service Case*, 56 Dickinson L. Rev. 107; see, also, list of articles in Spector Motor Service v. O'Connor (2 Cir.) 181 F. (2d) 150, 154.[34]

As has been so often stated, not all burdens upon Commerce, but only undue or discriminatory ones, are forbidden. Western Live Stock v. Bureau of Revenue, *supra;* McGoldrick v. Berwind White Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. ed. 565. *Although interstate commerce must pay its way, a state can-*

[34]Mr. Justice Black, concurring in Northwest Airlines v. Minnesota, 322 U.S. 292, 302, 64 S. Ct. 950, 955, 88 L. ed. 1283, 1290, said: "These problems, it seems to me call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution."

not put a barrier around its borders to bar trade from other states and thus run contrary to the power in Congress to regulate commerce among the states.

In Miller Brothers Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. ed. 744, there was no duty on an out-of-state merchant to collect and remit a tax on the use, storage, or consumption of articles, even though the vendor's advertising with papers and radio stations of its home state reached the people in the taxing state; its occasional sales circulars mailed to all former customers included customers in the taxing state; and some of the purchases were delivered in the taxing state by common carrier and some by the vendor's own trucks. There was not sufficient local incidence to sustain the taxing power.

In Norton Co. v. Dept. of Revenue, *supra*, the United States Supreme Court sustained a tax on gross receipts from all sales to persons in Illinois, except on orders sent directly by the customers to the head office and shipped directly to the customers from the head office. *The exception made is significant because of the similarity of facts in the case at hand where orders were sent to Mason City, Iowa, for acceptance and shipment of goods f. o. b. Mason City.* The local incidents were a branch office which made local sales at retail from a limited inventory carried there, received orders and forwarded them to the head office for action there, and acted as an intermediary to reduce freight charges on goods shipped from the head office. The case is distinguishable because of the existence of a substantial retail sales outlet, not found in the instant case.

In Nippert v. Richmond, *supra*, a license tax was invalidated. The tax had been imposed upon a solicitor who had been in the city for five days soliciting orders for out-of-state con-

firmation and shipment into the state. Notwithstanding that only casual solicitation was involved, the case is persuasive for the proposition that mere solicitation is not sufficient to uphold the application of the tax. However, because the court questions the conclusiveness of the local-incidence test, use of the case may not be well taken. The court states that local incidence will be weighed along with the danger of multiple burden taxation. The court also states that it would be possible to find local incidence in any case (327 U. S. 423, 66 S. Ct. 589, 90 L. Ed. 764):

> "* * * All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact."

Included in this statement is the recognition that interstate commerce must necessarily be carried on within the states (327 U. S. 423, 66 S. Ct. 589, 90 L. Ed. 764):

> "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

Thus, the United States Supreme Court gives consideration to the operating incidence of the tax. No case has ever actually departed from the basic principle that interstate commerce cannot be taxed by the states in the absence of local or intrastate business.

In McLeod v. Dilworth Co. *supra*, the United States Supreme Court made it clear *that a tax cannot be collected by the buyer's state on orders solicited in one state, accepted in another, and shipped at the purchaser's risk. The mere solicitation of orders is not sufficient local incidence to support the tax.*

In Cheney Brothers Co. v. Massachusetts, *supra*, from which we have quoted, it is clearly established that a foreign corporation is not subject to taxation when it merely maintains salesmen in the taxing state who have no power to confirm orders or collect accounts, or adjust complaints. The taxpayer was a Connecticut corporation engaged in manufacturing and selling silk fabrics. It maintained a selling office in Boston with one office salesman and four other salesmen, who, like those employed by the defendant company in Minnesota, solicited and took orders subject to approval by the home office in Connecticut, and the corporation shipped goods directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. The Boston office retained copies and records of orders taken but did no bookkeeping and made no collections. The salesmen and the office rent were paid directly from the home office, and other expenses of the Boston office were paid from a small account kept in Boston for that purpose. The corporation did no other business in the state.

In Alpha Portland Cement Co. v. Massachusetts, *supra*, heretofore alluded to, which follows the Cheney case, we have a New Jersey cement company maintaining an office in Boston, Massachusetts, *in the charge of a district sales manager* where the corporation's correspondence and other activities in connection with the solicitation of orders could be carried on. Orders received at the Boston office were transmitted to

the principal office of the corporation in Pennsylvania for acceptance. All goods and invoices were sent directly to the customer. Payments were usually made to the Pennsylvania office, but unlike the instant case, occasionally salesmen accepted payments. No samples or other merchandise were kept in Massachusetts. Its only property in that state was its office furniture and fixtures. Salaries and office rent were paid from the home office. Unlike the instant case, an incidental-expense bank account was maintained. The activities of the Alpha Portland Cement Co. in Massachusetts were more extensive than those of the defendant company in Minnesota; yet the United States Supreme Court struck down the tax as invalid.

Memphis Steam Laundry Cleaner v. Stone, *supra*, stated the function of the courts (342 U. S. 392, 72 S. Ct. 426, 96 L. ed. 439):

> *"The state may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.'"* (Italics supplied.)

Whether or not solicitation of interstate business may have some semblance of being a local incident, the United States Supreme Court has not permitted state taxation of this integral part of interstate commerce. Memphis Steam Laundry Cleaner v. Stone, supra. and cases cited therein.

The state places a great deal of reliance on International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, in support of its position. That case is chiefly important for its holding rendering the interstate corporation amenable to suit in the state courts on the basis of a finding of certain local incidents in addition to solicitation. The imposition of

the state unemployment compensation tax cannot be questioned. The commerce clause authorizes Congress to regulate interstate commerce. Congress by statute, now coded as 26 USCA, §3305 (a), has authorized the levying of the state unemployment compensation tax. Thus, since Congress has the power to authorize such a tax, there is no basis for attacking the tax on commerce-clause grounds. The International Shoe Co. case is distinguishable because there is no similar Congressional authorization for the levying of the Minnesota tax.

The state in its argument makes a point of admitting that a tax on the privilege of engaging in interstate commerce would be unconstitutional. However, the state goes on to argue that application of an income tax under the three-factor formula may be legally and constitutionally applied, even though there is no intrastate commerce or local incidents amounting thereto. Clearly this is contrary to the admitted rule that a state cannot tax the privilege of engaging in interstate commerce. The tax here involved imposes a direct tax upon interstate commerce. *If the taxpayer is engaged exclusively in interstate commerce, then its imposition is violative of the commerce clause and unconstitutional. It must find intrastate commerce activity to support its imposition or it is void as a direct tax. The state definitely argues the competitive privileges and advantages taxpayer has enjoyed over the years selling its cement products to Minnesota dealers. Unless taxpayer is actually engaged in intrastate commerce as such, in some form, and not engaged exclusively in interstate commerce, the state's contention without that local incidence as a base amounts to arguing for the imposition of the tax based upon the privilege, which taxpayer constitutionally enjoys free from state-tax intervention, of transacting its*

interstate business in the field of commerce between the states.

The present views of the United States Supreme Court are clearly set out in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573. The court stated that interstate commerce cannot be taxed by the states in the absence of local or intrastate business. The dictum, suggesting otherwise, in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, (62 S. Ct. 857, 86 L. ed. 1090, was repudiated. The court stated (340 U.S. 608, 71 S. Ct. 512, 95 L. ed. 578):

"* * * The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory.

"This Court heretofore ha struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. *The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state.* Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 (measured by percentage of capital stock and surplus). See Interstate Pipe Line Co. v. Stone, 337 U. S. 662, 669, et seq. (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Co., 330 U. S. 422; Freeman v. Hewit, supra." (Italics supplied.)

Although the case has been criticized as applying mechanical standards in determining what is the dividing point between interstate and intrastate commerce, there is no alternative so long as there can be no tax on the privilege of doing interstate commerce. The determination of what is interstate commerce must necessarily involve the analysis and distinguishing of facts. Freeman v. Hewit, *supra*.

The dissent in the Spector case not inappropriately states that there is (340 U. S. 612, 71 S. Ct. 513, 95 L. ed 580) "apparent need for clearing up the tangled underbrush of past cases." To reconcile all of the cases involving state taxation of interstate commerce would be a nearly impossible task. As stated before, there is comfort in recognizing that the courts consider each case on the basis of its own facts. See, Annotation, 44 A. L. R. 1228.

The state relies on a number of cases that unquestionably stand for the proposition that there can be no tax on the privilege of doing interstate business. United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135, held that a net-income tax was an indirect burden, thus not unconstitutionally imposed, noting that a gross-receipts tax is a direct burden. The case is distinguishable because the taxing state was the domicile of the interstate corporation. It maintained executive offices and an extensive manufacturing plant in the state of its domicile, the taxing state. No one would question the power of the state of Iowa to impose a net-income tax on taxpayer, domiciled there, yet engaged in interstate commerce, which would be the analogous situation.

The power of Iowa to impose a tax on taxpayer's net income, although not to be decided here, suggests the danger of multiple taxation which is grounds for invalidation of

the Minnesota tax. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823. Taxpayer has its executive offices and manufacturing plant in Iowa. *Under the multiple-burdens test, such state taxes on interstate business are invalid as are susceptible of being imposed with equal right by other states, so that interstate commerce is required to bear a heavier burden of taxation than is intrastate commerce.*

In both Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. 1832, and Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 69 S. Ct. 1264, 93 L. ed. 1613, a divided court upheld the imposition of a tax. The United States Supreme Court relied to some extent on the interpretation and application of the state statutory provision of "doing business" by the Mississippi Supreme Court. There was acceptance of the interpretation that the incidence of the tax was on local activities. The cases are distinguishable on the basis of finding local incidents of operation. Apparently, the United States Supreme Court has considered the pipe line cases to be best understood when taken together, even though the test is the same. In Memphis Natural Gas Co. v. Stone the court said (335 U. S. 89, 68 S. Ct. 1479, 92 L. ed. 1840):

> "* * * This Court has drawn the distinction in the field of pipe line taxation between state statutes on the privilege of doing business where only interstate business was done and those upon appropriate local incidents."

Local incidence of operation is controlling. Maintenance, repair, and manning of a pipeline was sufficient for the conclusion that the tax was on intrastate business.

Butler Brothers v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. ed. 991, involved an interstate corporation which main-

tained one of its wholesale distributing houses in the taxing state. Each of its houses maintains stocks of goods, serves a separate territory, has its own sales force, handles it own sales and all solicitation, credit, and collection arrangements in connection therewith, and keeps its own books of account. Although the court did not apply the incidence of operation rule, it is clear that the court thought there was no question but that intrastate activity was involved. There was much more than mere solicitation in the Butler Brothers case, and thus the case is distinguishable.

West Publishing Co. v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed 1603, affirming 27 Cal. (2d) 705, 166 P. (2d) 861, can be distinguished from the instant case because more than solicitation was involved. The salesmen were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. Although these activities are closely allied with solicitation, they are nonetheless activities in addition to the activities of mere solicitation. The West Publishing Co. case may be further distinguished from the instant case because therein the taxing statute, unlike §290.03 as applied here under the apportionment formula, was limited in application to income from sources of books and periodicals delivered in the state seeking to impose the tax.

The Butler Brothers and West Publishing Co. cases, following doctrine set out in United States Glue Co. v. Town of Oak Creek, *supra*, apparently proceed on the theory that a net-income tax, even on an exclusively interstate business, is an indirect burden on commerce and thus valid. To so reason is to ignore the approach of determining whether there are local incidents to uphold a finding of intrastate business. To use the direct-indirect distinction is to a large extent

to characterize a result. In discussing the various approaches used by the courts, one text writer stated:

> "Prior to 1938, when the Court was declaring that interstate commerce was exempt from local taxation, a tax was saved by declaring that the effect of the tax on interstate commerce was 'indirect,' which is a fashion in judicial speech tantamount to the conclusion that the taxed event was not considered interstate commerce. A tax levied on the actual movement of interstate commerce, or on the privilege of engaging in, or on gross receipts from that commerce, or on the means and instrumentalities used in interstate commerce (property taxes permitted) was struck down as having a 'direct' effect or being a 'direct' burden upon the commerce, which was another way of saying that there is no local power to tax interstate commerce." Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 Wash. U. L. Q. 233, 241.

The local-incidents test, with a line drawn at solicitation in cases involving distribution of merchandise and goods, places emphasis on an analysis of the facts. The defendant company was careful in its operations in Minnesota. None of its activities, if we follow the Cheney, Alpha, Spector, and Memphis Steam Laundry Cleaner cases, as well as other numerous pronouncements by the United States Supreme Court, can be construed to extend beyond solicitation, nor the business thus conducted be other than exclusively interstate commerce. Nothing appears from the contentions and the arguments presented, oral or written, exhibiting extensive research by both sides, which renders the line of decisions beginning with the Cheney case inapplicable here. The doctrine therein announced has been adhered to and reaffirmed by the highest court since the advent of the Cheney case.

Notwithstanding that solicitation is an integral part of interstate business, there is alternative reasoning which could be applied to the cases already discussed. It is submitted that commerce-clause grounds are better taken, however, due process under Amend. XIV requires some connection between the taxing authority and the taxpayer. A recent pronouncement by the United States Supreme Court in Miller Brothers Co. v. Maryland, 347 U. S. 340, 344, 74 S. Ct. 535, 538, 98 L. ed. 744, 748, states:

> "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. * * * Our decisions are not always clear as to the grounds on which a tax is supported, * * *; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. * * * *But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*
>
> "* * * Certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property." (Italics supplied.)

The overriding principle evident in this case and others involving state taxing powers is that operating incidence of the tax is of primary consideration. Depending on the facts

of each case, state taxing powers may or may not be exercised. As suggested, sales or use may be sufficient basis for the tax. The state of domicile, or the state in which a corporation has permission to do business, may when the required circumstances exist impose taxes. Even the least of these, *permission to do business,* may be the subject of this tax. *Mere solicitation, however continuous, has not been held sufficient to uphold a tax such as the one sought to be imposed here in any of the cases discovered through independent research.*

Similar taxes have been invalidated at levels below the United States Supreme Court. In State v. American Can Co., 117 Colo. 312, 186 P. (2d) 779, a tax on the entire net income derived from business transacted within that state was invalidly applied to a corporation of another state engaged in interstate business. The facts, similar to the facts in the instant case, included solicitation by men whose orders must be accepted at one of its foreign offices for goods manufactured outside the state and delivered to points outside of the state for shipment to state customers in the taxing state. In contrast the Colorado court, a short time before the decision in the American Can Co. case, had decided Cruse v. Stayput Clamp & Coupling Co., 113 Colo. 254, 156 P. (2d) 397. The latter case involved a net-income tax on a corporation domiciled in Colorado, the taxing state. The corporation maintained its executive offices and manufacturing plant in Colorado. The court upheld the imposition of the tax. It is clear from these two cases that the domiciliary state may impose its net-income tax following the line of cases coming down from United States Glue Co. v. Town of Oak Creek, *supra.* However, the state attempting to apply its net-income tax to the interstate business of a corporation not domiciled in the taxing state must find local incidents of intrastate-commerce quality sufficient to uphold the tax.

In matter of United Air Lines v. Joseph, 282 App. Div. 48 121 N.Y.S. (2d) 692, there is similar invalidation of a gross receipts tax, the question being whether there were sufficien local incidents to uphold the tax. The court in that opinion stated (282 App. Div. 54, 121 N.Y.S. (2d) 698): "The West ern Live Stock case is misunderstood if one fails to note in reading the last two paragraphs quoted that in order to ap portion a privilege tax on interstate commerce there mus first be some local or intrastate commerce. Mr. Justice Ston so states, the authorities cited by him and omitted from th quotation, so held expressly, or involved such factual suppor for their holding." It may be remembered that the Western Live Stock case is frequently cited as authority for a nondis criminatory tax on interstate commerce. Nevertheless, a recognized by the New York court, there must be connectio with the taxing state so as to support a finding of intrastat commerce. A case decided at the same time as the United Ai Lines case, and relying thereon for similar finding of an in valid application of the tax, is Matter of United Piece Dy Works v. Joseph, 282 App. Div. 60, 121 N.Y.S. (2d) 683 wherein the court held that the mere selling of merchandis or services in a state other than one in which seller was lo cated did not subject seller to tax jurisdiction in such othe state.

For further support, see Farwell, Ozmun, Kirk & Co. v Wallace, 45 N. D. 173, 177 N. W. 103, where a tax was held to be invalidly levied directly on the proceeds in the taxing state arising out of interstate commerce of a corporation no engaged in doing intrastate business.

A most recent pronouncement made by a state court, based upon a state of facts similar in many respects to that which presently confronts us, is to be found in Commonwealth v

Eastman Kodak Co., 385 Pa. 607, 124 A. (2d) 100. In that case the judgment of the lower court that a foreign manufacturer of photographic equipment, which had no tangible property in Pennsylvania except salesmen's automobiles and no office or place of business in Pennsylvania and was not registered to do business in the state and made no contracts therein, was not subject to the corporation income tax was affirmed by the Pennsylvania Supreme Court. The court held that the imposition of the tax on the corporation constituted a violation of the interstate commerce clause because it attempted to tax local business activities which were an integral part of the interstate flow of commerce that could not be separated from it. The persuasiveness of the Pennsylvania decision cannot be ignored. The Pennsylvania act under consideration openly states in the face of the commerce clause "A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditures of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred or received without the Commonwealth." 72 Purdon's Penn. Stat. Ann. (Perm. ed.) Sec. 3420n-2. The Pennsylvania court characterizes this statement of its statute as indicating the true nature of the tax. The Minnesota act in the instant case does not expressly state that its attempts to tax on the basis of outstate factors, thus the cases might be distinguished on the basis of the acts; however, as recognized by the recent Pennsylvania decision, relying upon cases cited from the Pennsylvania Supreme Court and the United States Supreme Court, the substance and not the form will control, i. e., the nature of a tax depends upon its incidence, not upon its label. The Pennsylvania court reached the conclusion that in the absence of incidence on local operation which was not

an integral part of interstate commerce the tax was invalidly imposed and that their Corporation Income Tax Law of 1951 in its application to the defendant therein was a violation of the interstate commerce clause and therefore unconstitutional.

The only marked dissimilarity in the facts in the latter case and the case at bar is that in the Pennsylvania case the defendant maintained no local office in the state from which its three resident salesmen operated, one of whom performed all of his services in Pennsylvania, and the fact that the Eastman Kodak Co. employed, besides its resident salesmen, 11 technical representatives who resided in Pennsylvania and who demonstrated to dealers and other users of photographic products the proper method to be employed in using defendant's products, four of whom confined their services within the state, the others performing services within the state and other states. Its tangible property in the state consisted of 10 automobiles, valued at $13,569. The comparison as to tangibles may be made by referring to the statement of facts in the instant case where taxpayer owned five automobiles and a small amount of office furniture in a three-room office, requisitioned, arranged for, and financed through the home office. In Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. ed. 916, petitioner corporation maintained an office in the taxing state in charge of a district sales manager. In the Pennsylvania case the taxing authorities sought to levy what purported to be a net-income tax based upon the operation of a three-fold formula not unlike what was done in the case at bar. The Pennsylvania court in discussing the manner of application of the three-fold formula to the facts of the case said (385 Pa. 615, 124 A. (2d) 103):

"Notwithstanding the fact that the Act seeks to impose what it calls a property tax, it is clear that the tax, *at least as far as the present defendant is concerned, is an excise tax for the privilege of doing business in Pennsylvania.* Cf. Roy Stone Transfer Corp. v. Messner, 377 Pa. 234, 103 A. (2d) 700, supra. The formula which the Commonwealth applies to this defendant makes crystal clear, if it were not otherwise so, that this tax is not a property tax on the local property of defendant, namely, ten automobiles or on the income from local activities as such—*it is an attempted excise tax on defendant's interstate commerce business out of which there were no local activities which could be considered as not an integral or realistically inseparable part of interstate commerce.*" (Italics supplied.)

We cite for purposes of illustration and comparison Matter of Gulf Oil Corp. v. Joseph, 307 N. Y. 342, 121 N. E. (2d) 360. An examination of this case indicates that the primary problem was the application of the apportionment formula. The court in that case accepted without question the finding that the taxpayer carried on substantial local intracity and intrastate sales activities as well as interstate business.

Since we have a tax on sales, made from a foreign corporation's (taxpayer's) business establishment and manufacturing plant outside of the state and shipped on order solicited in the state to state customers by rail (common carrier), f. o. b. Mason City, Iowa, pursuant to prices quoted to customer at mill site rate, plus freight, and since the taxpayer's activities in the state form an integral part of its interstate activities, with all revenues received by it from customer sales in the state resulting from its operations in interstate commerce, the tax assessed in the instant case is a tax upon the net income of a corporation whose business is exclusively that

of foreign commerce or interstate commerce, or both, and therefore in contravention of the commerce clause, U. S. Const. art. I, Sec. 8, clause 3.

The state taxing statute, M. S. A. 290.03, for the reasons stated, is in its application to taxpayer, here, upon the facts submitted, a violation of the interstate commerce clause and therefore unconstitutional.

Stress has been laid, in the majority opinion, on McGoldrick v. Berwind-White Co., *supra*, as authority for the claim that upon the factual situation presented in the instant case a tax may be levied on taxpayer's net income wholly derived from interstate commerce. In that regard reference is made especially to the statements of the court in the McGoldrick case that (309 U.S. 47, 60 S. Ct. 392, 84 L. ed. 570) "A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited." These statements derived from the definite factual situation existing in that case and from the cases cited by the court in support of the conclusion reached regarding the application of the tax situation there presented. The taxpayer sold coal to New York public utility and steamship companies, being a Pennsylvania corporation engaged in mining coal in the latter state. The tax involved was a 2 per cent tax upon receipts from every sale of tangible personal property sold within the city of New York. It was a tax laid upon every purchaser within the state, of goods sold for consumption, regardless of whether they had been transported in interstate commerce. Mr. Justice Stone, speaking for the majority of the court in that case, however, recognized the limitations imposed by the commerce clause and made it clear that certain types of taxation, by the states, are ruled out through the immunity af-

forded by the commerce clause. That statement is as follows (309 U.S. 48, 60 S. Ct. 393, 84 L. ed. 571):

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

It was held that the 2 percent tax laid upon every purchaser within the state, as applied to the Berwind-White Company, was without the possibility of such consequences. In that case taxpayer had asked the state courts to rule that the tax act did not apply to coal transactions which was the selling of coal to New York consumers for plants and steamships, particularly because the enabling statute expressly prohibits the city from imposing a tax upon (309 U. S. 58, 60 S. Ct. 399, 84 L. ed. 578) "any transaction originating and/or consummated outside the territorial limits of the City." This question had been left unanswered by the state court which had wholly rested its decision on constitutional grounds. Upon a reversal and remand of the case, the United States Supreme Court in its opinion said (309 U. S. 59, 60 S. Ct. 399, 84 L. ed. 578):

"Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

In Freeman v. Hewit reference was made to the Berwind-White case as follows (329 U.S. 257, 67 S. Ct. 279, 91 L. ed. 274):

"It have been urged that the force of the decision in the Adams case has been sapped by McGoldrick v. Berwind-White Co. * * *. The decision in McGoldrick v. Berwind-White was found not to impinge upon 'the rationale of the Adams Manufacturing Co. case,' and the tax was sustained because it was 'conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption.'".

Mr. Chief Justice Hughes, dissenting in the McGoldrick case, again made clear the principle which has been maintained throughout the years that the states cannot lay a direct tax upon interstate commerce. I am unable to agree that the McGoldrick case is controlling on the issues before the court in the case at bar. The case before us is one of interstate commerce in its most obvious form. We have here the imposition of a burden which intrastate commerce does not bear, and merely because interstate commerce is being done, places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

The tax will not be saved if it directly burdens interstate commerce. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365.

Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Cooney v. Mountain States T. & T. Co., 294 U.S. 384, 55 S. Ct. 477, 79 L. ed. 934.

It has been said heretofore that a desirable, just, and general scheme for raising revenues might well be reached through the cooperation of the Federal government and the states so as to avoid the differentiations which beset the application of the commerce clause and at the same time protect both state and national governments in the difficult field of general taxation. The consideration of such a policy belongs in the legislative field and is for the Congress and not for the courts. So far Congress has not seen fit to lift or set aside the duty of maintaining the immunity of the interstate commerce clause as the Constitution prescribed. We cannot lightly brush aside the statement made by Mr. Chief Justice Hughes in his dissent in the McGoldrick case (309 U. S. 69, 60 S. Ct. 404, 84 L. ed. 583):

> "• • • That immunity still remains an essential buttress of the Union; and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern of the national economy."

If the immunity afforded by the interstate-commerce clause applies in the instant case as contemplated by the Federal Constitution, then the within tax has been imposed, no matter by what name it is designated, without authority on the part of the state to do so.

I think the judgment entered against defendant taxpayer in the court below should be reversed.

FRANK T. GALLAGHER, Justice (dissenting).

In the instant case the trial court found that the defendant corporation's "activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

In its memorandum made a part of the decision the court said: "Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both." There was evidence to sustain such a finding and statement.

The majority appear to take the position, however, that the business which defendant did in Minnesota is large enough that it has become in effect a local business. It seems to me that the fact that the shipments into this state are extensive cannot change the nature of the business from that of interstate commerce, as found by the trial court, to intrastate commerce and thus form the basis of a finding of local activities upon which to sustain this tax.

In determining the constitutionality of a state tax on a foreign corporation's net income, it is necessary to distinguish those situations where the corporation is carrying on both intrastate or local business and interstate commerce in the taxing state from those situations where the corporation does only interstate business and all of its activities in the taxing state are therefore an integral part of interstate commerce.

From the holding in Spector Motor Service v. O'Connor, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573, a state tax, if reasonably measured, would be valid where the foreign corporation is engaged in both interstate and intrastate com-

merce in the taxing state but would be void as violating the commerce clause where such a corporation does purely an interstate business and all of its activities in the taxing state are an integral part of interstate commerce. Here we have a situation where it is undisputed from the court's findings that the activities of the defendant corporation in Minnesota are an integral part of its interstate activities; where all its revenue from Minnesota customers resulted from its operations in interstate commerce; and where, according to the court's memorandum, the tax is on the net income from business exclusively that of interstate commerce.

In Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. ed. 632, and Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 69 L. ed. 916, decided prior to the Spector case, the United States Supreme Court held invalid a Massachusetts tax on the net income of foreign corporations which were engaged only in interstate commerce in that state. As I see it, the Spector case reaffirmed the principle laid down in the Alpha and Cheney cases that a state cannot tax the net income produced by a corporation engaged solely in interstate commerce.

In view of the trial court's findings in the instant case and the holdings in the Spector, Alpha and Cheney cases, I cannot agree with the majority that the attempted imposition of the tax here can be sustained. It seems to me that both the facts and taxing statutes involved in the Alpha case bear a close resemblance to the one before us. In that case the State of Massachusetts attempted to impose a 2½ per cent tax on that part of the company's net income derived from the business carried on in that state, not less than a tax of .05 per cent on the corporation's net worth allocable to Massachusetts. In holding the tax invalid under the commerce clause, the

United States Supreme Court said (268 U. S. 217, 45 S. Ct. 480, 69 L. ed. 923): "Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount."

It appears to me that McGoldrick v. Berwind-White Co. 309 U. S. 33, 60 S. Ct. 388, 84 L. ed 565, is distinguishable from the case at bar. That was a proceeding to review a determination of the comptroller of New York City assessing a New York City retail sales tax deficiency against a Pennsylvania corporation. The question for consideration there was whether the New York City tax laid upon sales of goods for consumption as applied to the company infringed the commerce clause of the Federal constitution. As I see it, that case involved only a tax on sales of goods for consumption imposed by New York City where the merchandise was to be used and is not the same situation as here.

West Publishing Co. v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603 (affirming 27 Cal. (2d) 705, 166 P. (2d) 861, also is distinguishable. While the facts in that case are not set forth in the per curiam opinion of the United States Supreme Court, the California Supreme Court based its decision upon the finding that there were local activities. In that case the West Publishing Company maintained a stock of merchandise within the State of California. Its salesmen had authority to make and did make adjustments and collect delinquent accounts. With reference to its local activities the California Supreme Court had this to say (27 Cal. [2d] 707, 166 P. [2d] 862):

> "• • • During this time it had four regularly employed solicitors in this state who devoted their entire

time to plaintiff's business. Its California employees were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. The employees were given space in the offices of attorneys in return for the use of plaintiff's books stored in such offices."

No such local incidents are present here as the defendant company kept no stock of merchandise in Minnesota. All orders were sent directly to the foreign office and all orders were approved and collections and adjustments made out of that office. Rather it appears to me that defendant here has operated along the methods found in the Alpha and Cheney cases where the attempted tax was invalidated because of lack of local activities.

In conclusion, it is my opinion, under the record here, that the activities of the defendant company in Minnesota were an integral part of its interstate commerce; that its Minnesota revenues resulted from its operation in interstate commerce; and that the attempted tax is on the net income of a business exclusively engaged in interstate commerce and therefore cannot stand.

For the reasons set forth I respectfully concur in the dissent of Mr. Justice Nelson.

STATE OF MINNESOTA
SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs. 36826

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

TRANSCRIPT OF JUDGMENT

SUPREME COURT
State of Minnesota
ss.

I, Mae Sherman, Clek of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul September 10, 1957

MAE SHERMAN, Clerk

By ,Deputy.

STATE OF MINNESOTA, SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs. 36826

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein do have and recover of appellant herein the sum and amount of Two Hundred Thirty and 40/100 Dollars, ($230.40) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed September 10, 1957

By the Court

Attest:

Mae Sherman, Clerk.

STATEMENT FOR JUDGMENT

Statutory Cost $25.00, Printer $205.40, Clerk $—, Acknowledgments $—, Return $—, Postage and Express $—, Appeal Bond $—, Transcript $—

Total $230.40

Satisfaction of Judgment filed

Therefore the above judgment is duly satisfied in full and discharged of record

Attest: Clerk.

By Deputy.

APPENDIX B

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT.

The above entitled action, being on the General Term Calendar of this Court, came duly on for hearing before the undersigned on November 8 and 9, 1954, without a jury, Joseph S. Abdnor, Esq., then Assistant Attorney General, appearing on behalf of the plaintiff at the trial, and Miles Lord, Esq., Attorney General and George R. Johnson, Esq., Assistant Attorney General, appearing on behalf of plaintiff on argument and briefs, and Bundlie, Kelley & Maun by Joseph Maun, Esq., appearing on behalf of defendant on all occasions.

On the trial of this cause the parties adduced evidence in support of their respective contentions, from which the Court hereby makes and files the following

FINDINGS OF FACT

I.

That at all times material hereto the defendant, the correct corporate name of which is Northwestern States Portland Cement Company, was a corporation organized and existing under and by virtue of the laws of the State of Iowa, with principal offices and place of business in Mason City, Iowa.

II.

That at all times material hereto the defendant operated on a fiscal year basis with its fiscal year ending on November 30th.

III.

That the defendant is not now and was not during the years material hereto authorized under the applicable statutes of the State of Minnesota to transact business in this state and the defendant filed no income tax returns with the Commissioner of Taxation of the State of Minnesota for any of its taxable years here involved.

IV.

The plaintiff, acting through the Commissioner of Taxation of the State of Minnesota, prepared on the basis of information available to the said Commissioner of Taxation income tax returns for the defendant for its fiscal years 1933 through 1948, inclusive, and assessed against the defendant the income taxes shown to be due by said returns. In the preparation of such returns, the Commissioner used the three-factor formula described in Minnesota Statutes 1953, 290.19, in determining the portion of the defendant's overall net income for each of its fiscal years here involved which was to be allocated to Minnesota and subjected to the income tax imposed by this state. The three factors utilized in this formula are (1) the ratio of the taxpayer's sales assignable to Minnesota during the year to its total sales for the year wherever made, (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated,

and, (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year. The income taxes, penalties and interest assessed against the defendant for its fiscal years ended in 1933 through 1948 and herein sought to be collected are as follows:

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	806.48	40.32	512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

V.

That during the years material hereto defendant was engaged in the manufacture and sale of cement. Its home office and plant were located in Mason City, Iowa. It maintained a sales office in the Roanoke Building, Minneapolis, Minnesota, which was operated under a lease paid for from the defendant's home office in Mason City, Iowa. The defendant owned no real estate in Minnesota but did own personal property in this State consisting of office furniture and fixtures, supplies, good will advertising and other material located in its Minneapolis sales office. The office consisted of three rooms and the personal property consisted of three desks, two filing cabinets, a typewriter and some chairs.

In addition, the automobiles used by the defendant's salesmen were owned by the company and were located, of course, in the State of Minnesota.

VI.

That during the years material hereto defendant had at the most no more than six employees residing in the State of Minnesota. Two salesmen and a secretary were the employees of the defendant operating out of its Minneapolis sales office. The other employees of the defendant in this state operated directly out of their homes. All were residents of Minnesota. All Minnesota employees of the defendant were hired by supervisory personnel from the defendant's home office in Mason City, Iowa. No employee of the defendant in the State of Minnesota had at any time any authority to hire or fire any other employee.

VII.

The personal property of the defendant located in the State of Minnesota during the years here involved was paid for out of defendant's home office in Mason City, Iowa. Most of the supplies used in Minnesota by the defendant were obtained from the Mason City office. The defendant's employees in the Minneapolis office did have authority to purchase supplies, such as stamps, etc. That defendant did not maintain a bank account in Minnesota and no petty cash fund was maintained in this state. The salaries of the Minnesota employees were fixed by the Mason City office and paid directly from defendant's home office in Iowa. The defendant's Minnesota salesmen were reimbursed directly from the Mason City office for customer entertainment ex-

pense incurred by them. The defendant's employees were on a straight salary basis and vacation policies were established by the home office at Mason City. The territories of the defendant's salesmen in Minnesota were allocated by the home office and the Minnesota employees did not have authority to reallocate the territories among themselves. The defendant maintained two telephone lines in its Minneapolis office and was listed in both the classified and alphabetical sections of the Minneapolis telephone directory. All telephone bills were paid directly by defendant's Mason City home office. The office was also listed in the Minneapolis city directory.

VIII.

That the defendant's employee Wilkins held himself out as and was in fact, the defendant's district manager. That Wilkins was in charge of the Minneapolis sales office. That the defendant's employee Wilkins was listed in the telephone directory and in the city directory as district manager and that applications for automobile license plates were signed by the employee Wilkins as defendant's district manager. That on occasion defendant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles. Such purchases were on bids approved by the home office.

IX.

That during the years here involved the Minneapolis sales office of the defendant was used to some extent as a central office for the Minnesota salesmen and Minnesota customers. That this office was a clearing house for orders that customers telephoned or sent in to this office. It was an office

where complaints might be made or inquiries directed. This office was available to the out-state salesmen when they were in Minneapolis, that is, a place where they might use the telephone or do their work. Also available in this office were advertising supplies such as pencils, pads and blotters for customers.

X.

The orders received by the defendant's salesmen in the State of Minnesota were transmitted daily to defendant's home office in Iowa where they were approved by the home office. The orders received by defendant from its Minnesota salesmen were acknowledged by it from its home office in Mason City directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or mail. The Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit. Credit extensions and collections were handled by the defendant's home office in Mason City. Claims for loss or damage were generally handled through the home office but it was not uncommon for a salesman to handle the adjustment of claims with customers although final approval of the adjustment was necessary from Mason City. Its activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce.

XI.

That the defendant was engaged in selling and delivering cement to Minnesota customers for at least thirty years prior

to the commencement of the action here involved. That 48% of defendant's entire sales were made to customers within the State of Minnesota. That the price of defendant's product was the delivered price to the customer. That the defendant endeavored to keep the base price and freight rates separate but in all cases the purchaser paid the price of the product delivered to his place of business and that it was impossible to purchase cement from the defendant except at a delivered price or to pick up defendant's products at defendant's plant or office in Iowa.

XII.

That during the years in question defendant's merchandise was invoiced and shipped by rail from the defendant's home office at Mason City directly to the purchaser. The defendant's purchasers were located in Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin. The defendant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no merchandise was stored or kept by it in this state. Price quotations were prepared and sent out from defendant's home office in Mason City and changes in price were prepared by that office. That by reason of the defendant's location, it enjoyed a definite competitive advantage over Minnesota cement companies by reason of the favorable freight rates to the defendant by reason of the fact that it was in closer proximity to southern Minnesota customers than such customers were to Minnesota cement producers.

XIII.

That defendant's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the purchase of merchandise, such orders being subject to acceptance, filling and delivery by the defendant from its home office in Mason City, Iowa. That the function of the Minneapolis sales office and all of its employees in addition to soliciting orders for merchandise consisted of a regular and systematic method of contacting potential customers and users of cement products, the promotion and building of good will, the entertainment of customers and the doing of all things necessary to maintain and enlarge the volume of business done by the defendant in the State of Minnesota. Large quantities of defendants cement products were used for the building of state local highways and such orders sometimes called for forty to fifty thousand barrels of cement and in addition the employees of defendant were required to contact builders, contractors and architects and any other potential user of defendant's products.

XIV.

The defendant's employees in Minnesota, with the exception of the secretary in the Minneapolis office, were all salesmen. That it was their job to sell defendant's products and build good will for the defendant. That defendant would sell only to eligible dealers which are lumber and building supply dealers, contractors and ready mix companies. That defendant maintained a list of all eligible Minneota customers in its Iowa office and no matter how an order came into the home office, the company would not sell unless the order had come in from an eligible purchaser.

The defendant's salesmen were provided with lists of all eligible purchasers in their territory and were required as a part of their job to call on every potential customer as often as possible. Salesmen in outstate territories call on a customer on an average of every three weeks and in the Twin City district, customers were called on much more frequently.

XV.

That because of the substantial volume of business carried on in Minnesota, there was a steady and continuous flow of defendant's products into the State of Minnesota at all times. That the defendant has maintained its Minneapolis sales office for many years. That defendant's activities in Minnesota are regular, systematic and well organized for the purpose of selling defendant's products.

XVI.

That the defendant predecessor corporation has resorted to the Courts of the State of Minnesota to enforce its contracts on one occasion.

CONCLUSIONS OF LAW

I.

That this Court does have jurisdiction over the defendant in this action.

II.

That the defendant's employee Wilkins was a proper person on whom to make service of process and, therefore, the service of process was valid to subject the defendant to jurisdiction.

III.

That the assessments against the defendant by the State of Minnesota and the income taxes, penalties and interest which the plaintiff here seeks to collect from the defendant does not contravene the due process clause of either the Fourteenth Amendment of the Federal Constitution or Article I, Section 7, of the Constitution of the State of Minnesota.

IV.

That the assessments against the defendant of the income taxes, penalties and interest which the State of Minnesota is here seeking to collect from the defendant is not in conflict with or in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States.

V.

That the plaintiff is entitled to recovery against the defendant as prayed for in the complaint.

Let judgment be entered accordingly by the Court.

Dated at Minneapolis, Minnesota, this 31st day of August, 1955.

PAUL S. CARROLL,
Judge of District Court.

Stay 60 days.

MEMORANDUM

This is a tax case involving the principle of the Drummer cases. The tax itself, passed by the Minnesota Legislature, is Sec. 290.03, M.S.A. I quote the pertinent portion: "An annual tax for each taxable year computed at the rates and in the manner hereinafter provided is hereby imposed upon the taxpayer's net income for such year of the following classes of taxpayers: 1. Domestic and foreign corporations not taxable under Sec. 290.02 which own property within this state or whose business with the state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both."

Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce, or both. It is definitely not a tax on the franchise of the corporation to do either a local business or an interstate business. Considerable care has been taken in preparing the Findings of Fact because in cases of this kind it often happens that much depends upon the exact Findings of the trial Court. I have tried to cover with a Finding every disputed, or otherwise, question of fact that arose under the testimony.

Defendant claims the tax is unenforceable because Minnesota exceeded her power and denied defendant certain rights under both the Federal and state constitutions. So far as the Federal constitutional questions are concerned, the ultimate authority rests in the decisions of the United States Supreme Court. (See 240 Minn., 71 at page 81.) All the cases, even of the Supreme Court, cannot be reconciled, and to some extent the best one can do in our position is to follow the latest decision. This the Court intends to do. In the Constitution of the United States of America, Revised

and Annotated 1952, at page 179 and following there is a discussion of the type of case in question. On page 179 the author quotes from Freeman v. Hewit, 329 U.S. 249, a decision in 1946 by Justice Frankfurter: "The power of the states to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need of such adjustment is inherent in a Federal Government like ours where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent states. The history of this problem is spread over hundreds of volumes of our reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as a product of preoccupation with their special paths."

This Court will now consider the claimed defenses in their respective order: 1. Defendant contends that service in this case, which was made on Mr. William R. Wilkins, did not comply with Minnesota Statutes, Sec. 543.08. Wilkins was something more than just a salesman. He called himself the defendant's district manager. That, in itself, did not mean much. But the Court feels that service on him under the circumstances was safe enough to protect the fundamental rights of notice, and so forth, of the defendant. At the oral argument defendant's counsel withdrew this issue, and therefore nothing more need be said about it now.

Second, defendant contends that it is not amenable to our courts because it was "not in our state", and therefore, jurisdiction could not be obtained, it being a non-resident corporation. This issue involves the question raised in so

many cases of a non-resident corporation doing business in another state. Defendant cites the 14th Amendment of the Federal Constitution, and Article I, Section 7, in the Minnesota Constitution. The facts are set out in detail in the Findings. They are sufficient to constitute presence for the purposes of jurisdiction. Forty-eight per cent of defendant's business is done in Minnesota. It was done by regular and systematic solicitation of orders. (In connection with this, as stated by Justice Jackson in Miller Bros. v. Maryland, 347 U.S. 340, "Probably except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject.") As stated in International Shoe Company v. Washington, 326 U.S. 310 (1945), "If the defendant be not within the territory of the forum, he have certain minimum contacts with it so that the maintenance of the lawsuit does not offend traditional notions of fair and substantial justice." Facts which are pertinent to this issue are set out in the Findings, from all of which one reaches the conclusion that Minnesota did have jurisdiction insofar as the 14th Amendment is concerned. Authorities for this result are found in the following cases: 230 Minn. 217; 240 Minn. 71 and particularly a discussion starting on page 80 and continuing to page 87; International Shoe Co. v. Washington, 326 U.S. 310; Nippert v. City of Richmond, 327 U.S. 416; Juridictions over Foreign Corporations, 34 Calif. Law Review 331; see also the following: 347 U.S. 340, the 1953 case of Miller Bros. v. Maryland; Alpha Portland Cement, 268 U.S. 203, which, incidentally, is cited later in the Spector case.

The third ground raised by defendant is in substance simply this; that Minnesota is attempting to tax on something over which it has no jurisdiction. This is a question of jurisdiction

of the thing as distinguished from jurisdiction of the person as raised in point No. 2. An attempt to place a tax on something over which the state has no jurisdiction is a violation of due process and the 14th Amendment and its comparable section in the Minnesota Constitution. This is a tax on net income arising out of business done by the corporation in Minnesota. The levy is fairly proportioned and non-discriminatory. There is no claim that the tax placed an undue or unfair burden on interstate commerce. It is not a tax for use of highways, nor collected in lieu of ad valorem or property taxes. It is not a fee for inspection, or sales tax. As said in many cases, whether a state may make interstate commerce pay its way depends upon the constitutional channels through which it attempts to go. See Memphis National Gas Co. v. Beeler, 315 U.S. 649, decided in 1942. See also 276 U.S. 245.

The United States Supreme Court has said in Ott v. Mississippi Barge Line Co. 336 U.S. 169 (1949) with reference to this due process question that a proper test is: Does the tax have any relation to opportunity, benefits, or protection conveyed or afforded by the taxing state? Of course this tax directly relates to the opportunity, benefits and protection conveyed by the State of Minnesota. Minnesota provides a civilized and lawful community into which foreign corporations may come and do business. Courts and police must be maintained, highways kept in repair, and roads built over and under the railroads which haul the defendant's products. The fact that the tax relates to benefits does not alone meet the requirement of due process. A proper apportionment formula is also required. There must be a reasonable reflection of the value of business done in the taxing state. This tax law so provides. Similar taxes have been upheld as against due process. See 329 U.S. 416; 315 U.S. 501; 308 U.S. 331.

If this tax does not violate the Commerce Clause it seems to this Court that Minnesota did have jurisdiction to levy this tax, and it is valid. There are trends in the decisions, which make it difficult to be certain what an Appellate Court would do. I base my decision on the following cases: Wisconsin v. Penny Co., 311 U.S. 435 (1940); also 311 U.S. 452; and 303 U.S. 77; Memphis v. The National Gas Co., 335 U.S. 80 (1947); and Memphis National Gas v. Beeler, 315 U.S. 649 and those heretofore cited. On the basis of these and many other cases I conclude that insofar as due process is concerned, aside from the remaining problem of the Commerce Clause, the tax is valid.

The fourth and last point raised by the defendant is that this law violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. The claim is that this tax is upon a corporation engaged exclusively in interstate commerce and that it is on the defendant's privilege of engaging in interstate commerce in the State of Minnesota, and that therefore it constitutes an unreasonable, unlawful and oppressive burden on interstate commerce. There is no question but what the right or privilege of engaging in interstate commerce as such cannot be taxed by a state. See Spector Motor Service supra. It is also true that interstate commerce is, now at least, required to carry its fair share of the burden of taxation in the particular state where it operates. Again, whether a state may validly make interstate commerce pay its way depends, first of all, on the constitutional channel through which it attempts to go. Therefore, the question is, did Minnesota in creating this tax provide a constitutional channel, or did it go through a route which was not constitutional. More particularly, it seems to me, the real issue in this case is whether a tax on a foreign

corporation doing a substantial portion of its business in interstate commerce can be levied against the net income of that corporation arising out of business done in the particular state levying the tax. The defendant relies very heavily on the comparatively recent case (1950) of Spector Motor Service Co. v. O'Connor, 340 U.S. 602, and also the older cases cited in the Spector case, to-wit, Alpha Portland Cement v. Massachusetts, 268 U.S. 203, and Cheney Bros. Co. v. Massachusetts, 246 U.S. 147. The state claims that these cases are all cases where the tax is upon the franchise of the foreign corporation but measured in some way by the income of the particular corporation, and the State attempts to draw a distinction between such cases and those where the State levys a non-discriminatory income tax on a foreign corporation, at least on that portion of the business which is done with Minnesota residents. These cases, and particularly the Spector case, hold that the tax is a direct tax on the right of these defendants to carry on an interstate commerce business, and therefore illegal. They do not hold that a fairly apportioned tax on the net income of a corporation doing an intertate business is unconstitutional. The first sentence of the headnote of the Spector case reads as follows: "Connecticut imposes upon the franchises of foreign corporations for the privilege of doing business within the state a tax computed at a non-discriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities in the state." It will be noted that the tax is upon the franchise or the right to do business, interstate business, and that is something that no state can do. I have not been able to find any case where a non-discriminatory income tax has been held to constitute a violation of the Commerce Clause, nor on the other side of the question

have I found one that specifically held that it was not, at least no holding where it was absolutely necessary to a decision in the case. There are several cases where strong statements are made indicating that that is the law. The West Publishing Company decision, 27 Calif. 2nd 705, does definitely draw the distinction between a direct tax on the right to do interstate commerce business but payable from a percentage of net income, and a fairly apportioned tax on net income. The California Court did not have to go as far as it did to sustain the tax. The decision was affirmed by the United States Supreme Court in a very short opinion. It can be assumed that it affirmed and approved the result, but to what extent it agreed with the language of that decision I would not know. In Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, and particularly at page 656, the Court said this: "In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee on the net income of the foreign corporation having a commercial domicile there or upon net income derived from within the state is not prohibited by the Commerce Clause on which alone the taxpayer relies." This certainly is strong language favoring the State's position. I do not think it was necessary to a decision in this case, and how binding it is I would not know.

The case of Schaffer v. Carter, 252 U.S. 37, and particularly at page 57, certainly uses language that is almost in point on this question favorable to the State. If I correctly read the dissenting opinion of Judge Learned Hand in Spector Motor Service v. Walsh, 139 Fed. 2d 809 at page 822, he affirms the distinction between a direct tax on the right to do interstate business and a tax on some contributing activity. "It seems to me clear that we are therefore not yet justified in sup-

posing that the distinction between an excise upon a Federal activity and an excise upon some contributing activity has ceased to exist." On the other hand, the language of Judge Clark in the main opinion would indicate that unless the Supreme Court changed its position (which it did not), "the tax in the case at bar would be illegal." See page 814. Attention is called to the fact that the Spector case has caused considerable doubt in this field of law, see The Constitution of the United States of America, Revised and Annotated, 1952, at page 209.

The case of United States Glue Co. v. Oak Creek, 247 U.S. 321, holds that the domestic state of a corporation may levy a tax on income of that corporation and include in it income derived from its exclusively interstate business. Now if this is not a violation of the Commerce Clause—if the local state of the corporation can tax all the income of one of its own corporations, whether derived from interstate commerce or otherwise, then why might not some other state where business was actually done by this corporation in interstate commerce have the same right at least to tax the income from such business derived in and from that particular state. One could be just as much a burden on interstate commerce as the other. Neither is a tax on the franchise itself. See pages 326 and 327 of United States Glue Co. v. Oak Creek supra. I also feel that the case of Postal Telegraph Cable Co. v. Adams, 155 U.S. 688, at particularly pages 695 and 696, furnishes strong support for the State's position.

This Court has been aided greatly by the written briefs and the oral arguments of both the attorneys. I have not attempted, by any means, to cite all the cases that this Court has read or that have been cited to the Court. It seems to me, without relying on any particular theory, that the

weight of the law, all things considered, favors the holding of constitutionality so far as this [tas] statute is concerned. It is regrettable that this matter has not been settled long, long before this.

Let this memorandum be made a part of the foregoing decision in this case.

P. S. C., Judge.

ORDER FOR AMENDED FINDINGS OF FACT

The defendant in the above entitled action having moved this Court for amended Findings of Fact, Conclusions of Law and Order for Judgment, the matter was placed on the special calendar and came duly on for hearing before this Court in chambers on October 3, 1955, at 10:00 a.m., Bundlie, Kelley & Maun by William R. Busch, Esq., appearing on behalf of the defendant, and Miles Lord, Esq., Attorney General, by George R. Johnson, Esq., Assistant Attorney General, appearing on behalf of the plaintiff.

The Court having heard the arguments of counsel and being apprised in the premises, the Motion is hereby in all respects denied except as hereinafter ordered.

It is hereby ordered that the Findings of Fact in the above entitled matter be amended to read as follows:

VIII.

That the defendant's employee Wilkins held himself out as the defendant's district manager and the company had knowledge of this fact. That Wilkins was in charge of the Minneapolis sales office. That the defendant's employee Wilkins was listed in the telephone directory and in the city directory as district manager and that applications for

automobile license plates were signed by the employee Wilkins as defendant's district manager. That on occasion defendant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles. Such purchases were on bids approved by the home office.

IX.

That during the years here involved the Minneapolis sales office of the defendant was used to some extent as a central office for the Minnesota salesmen and Minnesota customers. That this office was a clearing house for orders that customers telephoned or sent in to this office. It was an office where complaints might be made or inquiries directed. This office was available to the defendant's other Minnesota salesmen when they were in Minneapolis, that is, a place where they might use the telephone or do their work. Also available in this office were advertising supplies such as pencils, pads and blotters for customers.

X.

The orders received by the defendant's salesmen in the State of Minnesota were transmitted daily to defendant's home office in Iowa where they were approved by the home office. The orders received by defendant from its Minnesota salesmen were acknowledged by it from its home office in Mason City directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or mail. The Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit. Credit

extensions and collections were handled by the defendant's home office in Mason City. Claims for loss or damage were generally handled through the home office. But it was not uncommon for customers to present their claims to the salesman who writes the company informing it of the trouble and requesting the company what they wish to do about it. Its activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce.

Dated at Minneapolis, Minnesota, this 11th day of October, 1955.

Stay 20 days.

PAUL S. CARROLL,
Judge of District Court.

(Title of Cause.)

AMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT.

* * *

The Amended Findings of Fact, the Conclusions of Law, and the Order for Judgment contained herein are hereby filed in lieu of the Findings of Fact, Conclusions of Law and Order for Judgment dated the 31st day of August, 1955.

Let judgment be entered accordingly by the Court.

Dated at Minneapolis, Minnesota, this 11 day of October, 1955.

PAUL S. CARROLL,
Judge of District Court.

Stay of 20 days.

(Title of Cause.)

JUDGMENT

The above entitled action, having been regularly placed upon the calendar of the above named Court, came on for trial before the Court, without a jury, on November 8, 1954. Joseph S. Abdnor, Esq., then Assistant Attorney General, appeared on behalf of the plaintiff at the trial, and Miles Lord, Esq., Attorney General, and George R. Johnson, Esq., Assistant Attorney General, appeared on behalf of the plaintiff on argument and briefs, and Bundlie, Kelley & Maun by Joseph Maun, Esq., appeared on behalf of defendant on all occasions. The Court, after hearing the evidence adduced at the trial and having been fully advised in the premises, did on the 11th day of October, 1955, duly make and file its Findings of Fact, Conclusions of Law and Order for Judgment therein.

Now, therefore, pursuant to said order and on motion of George R. Johnson, attorney for the plaintiff, Judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $102,536.82 with interest at the rate of 4% per annum on the sum of $70,578.31 from December 1, 1953.

Dated this 4th day of November, 1955.

By the Court,
PHILIP C. SCHMIDT,
Clerk of District Court.

APPENDIX "C"

STATUTE INVOLVED.

When first adopted in 1933, the pertinent provisions of the statute which is now referred to as *Minnesota Statutes*, §290.03, read as follows:

"Sec. 3. Rate of tax—(a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in sub-section (b) hereof, computed in the manner and at the rates hereinafter provided.

"(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year."

Laws, 1933, C. 405.

The said statute was amended in 1937, to read as follows:

"Sec. 3. Rate of tax.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations whose business within this state during the taxable year consists ex-

clusively of foreign commerce, interstate commerce, or both;"

Laws, 1937, Ex. Sess. C. 49

The statute was amended in 1941, to read as follows:

"2394-3. Classes of taxpayers.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both."

Laws 1941, C. 550.

An additional minor change was made in the said statute in 1945, so that it then read as follows, and now appears as Section 290.03 Minnesota Statutes:

"290.03. Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;"

Laws 1945, C. 410.

The statute as re-enacted in 1945, is the statute in its present form.

The statute as originally adopted is found in Minnesota Laws, 1933, chapter 405, page 690.

The statute as first re-enacted is found in Minnesota Laws, 1937, Ex, Sess. c. 49, page 61.

The statute as re-enacted and amended in 1941 is found in Minnesota Laws, 1941, chapter 550, page 1153.

The statute as re-enacted and amended in 1945 is found in Minnesota Laws, 1945, chapter 410, page 787.

No.

12

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Supreme Court of the United States

October Term, 1957

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO RESPONDENT'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

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Supreme Court of the United States

October Term, 1957

No. 606

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO RESPONDENT'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The State of Minnesota, in its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" suggests that this Court dispose of this proceeding, on the theory that both the commerce clause and the due process clause questions have been foreclosed by prior decisions of this Court.

The problem is not quite that simple. For example, since the appellant filed its Jurisdictional Statement, the Supreme Court for the State of Georgia[1] (*Stockham Valves & Fittings, Inc. v. Williams* decided November 8, 1957) has held that the attempt of that state to impose an income tax upon a foreign corporation doing an exclusively interstate business in that state, under circumstances practically identical to the facts in this case, was invalid as violating both the commerce and the due process clauses of the Federal Constitution.

The view of the Georgia Supreme Court certainly is wholly contrary to that expressed by the Attorney General of the State of Minnesota in his statement in this proceeding. The Supreme Court of Minnesota itself has now certified to this Court that the decision it rendered in this case is substantial and important. The original of that certification has been filed with this Court and is reproduced in full in the appendix attached hereto.

In an article published in the July-August 1957 issue of the *Harvard Business Review* entitled "Legal Hazards of Interstate Business",[2] the practical aspects of this problem were very comprehensively discussed. The views expressed therein are diametrically opposed to those of the State of Minnesota here, for the authors say:

> "It is no wonder, therefore, that many pitfalls and hazards await the growing corporation in almost every state where it goes to do business. To illustrate:

[1]The opinion of the Supreme Court of the State of Georgia is as yet unreported except in looseleaf services. However, it is reproduced in the appendix attached hereto. A motion for rehearing in the case was filed by the State of Georgia and this was denied by that Supreme Court on November 26, 1957. The Revenue Commissioner of the State of Georgia has announced that a petition for a writ of certiorari will be filed in this Court.

[2]*Harvard Business Review*, Vol. 35, No. 4, p. 81, Article by Roger D. Swett and John W. Hupp.

"In 1955 an Iowa cement company which had for years been shipping cement to customers in Minnesota was held liable in the Minnesota courts for unpaid state income taxes, interest, and penalties in excess of $100,000 covering a period of 15 years. During those 15 years the company had maintained a small sales office in Minneapolis and had shipped cement from its Iowa plant to Minnesota customers on orders accepted in Iowa, but it had never qualified to do business in Minnesota. The court held that it had nevertheless been doing sufficient business in Minnesota to be subject to the state income tax law." [The article cited this very case.]

And further, in the same article under a section entitled "Confusing Tax Laws" they stated:

"The biggest problem for corporate management is state taxation. Coping with these highly technical and varying laws is difficult, and has been compounded by a long line of confusing court decisions on the extent to which the federal Constitution permits a state to exact taxes from foreign corporations (i.e., companies incorporated in other states). As a result, each of the various types of state taxes involves many perplexing problems.

* * *

"The tax problem is serious not only because the taxes themselves are burdensome, but also because failure to comply with the tax laws may have unfortunate results. Determinations of liability are made by the state authorities or the state courts, and doubts are usually resolved *against* foreign corporations. For the growing corporation a day of reckoning with state and local tax authorities is almost a certainty. This is especially so since under most state tax laws the statute of limitations does not run in favor of the taxpayer unless returns have been filed.

"In failing to comply with applicable state tax laws, a corporation may be exposing itself, its officers, and its local agents to criminal prosecution. In addition there is the danger of liability for back taxes, which can be especially heavy because of interest rates and penalties. In the case of the Iowa cement company referred to at the outset of this article, about one-third of the $100,000 judgment represented interest and penalties. Often the state tax authorities use the threat of interest and penalties as a lever to obtain advantageous settlements. The foreign corporation which has developed a substantial business in a state usually has too much at stake to be in much of a position to bargain."

The Law School of the Ohio State University recently took occasion to devote an entire issue of the *Ohio State Law Journal to* the question of state taxation of multistate business. In an article entitled "State Taxation of Interstate Commerce: From Form to Substance and Back Again"[3] a very learned thesis on this subject was presented in which the following comments were made:

"The problems presented by state taxation in the area of interstate commerce have been numerous and possess remarkable longevity. From Marshall's discussion in Brown v. Maryland in 1827 to the year 1954, when the Supreme Court considered the matter at length in several cases, the probing for lasting solutions to the frequent conflict between the commerce clause and the power of the state or one of its political subdivisions to tax has continued. Nor does the absence of written opinion by the Supreme Court in the last three years indicate that principles have finally, or even temporarily, crystalized for the guidance of state legislatures, state

[3]Ohio State Law Journal, Vol. 18, No. 1, page 9, by Albert R. Menard, Jr., Professor of Law, University of Colorado.

departments of revenue and taxpayers, and that disagreement is at an end. An inspection of the docket for the current term of the Supreme Court as of the time when the final draft of this article is in preparation (December, 1956) reveals the filing of no less than seven cases involving this issue. True, certiorari has been denied or the appeal dismissed in nearly all, and perhaps the remainder will produce no major decision. However, the current confusion surrounding the commerce clause issue no doubt was one of the factors that impelled attorneys to carry the cases up, and Justice Frankfurter has reminded us on a number of occasions that a failure of the Supreme Court to accept and review a case on the merits should not be deemed a concurrence in the correctness of the decision of the state court."

In another article in the same issue of the *Ohio State Law Journal* entitled: "State Fiscal Needs and Interstate Commerce"[4] the author, in discussing the question of taxation of interstate business, concluded:

"Perhaps the most disturbing aspect of the whole matter is the continuing uncertainty concerning the validity of the application of state tax laws to interstate activities."

In support of its motion to dismiss or affirm on grounds that the issues implied herein have been foreclosed by prior decisions of this Court, respondent relies upon the cases of *U. S. Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); and *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1946).

[4] Ohio State Law Journal, Vol. 18, No. 1 pp. 43-51 by Diswell L. Pierce, Secretary of the Board of Equalization, Sacramento, California.

Not one of these said cases deals with or in any way decided the critical issues involved in the instant case. In the *Oak Creek* case, the taxpayer was a *domestic* corporation unqualifiedly doing *intrastate* as well as interstate business, and the Wisconsin state income tax was applied to both intrastate and interstate income of the corporation. In *Shaffer v. Carter*, supra, the State of Oklahoma imposed its net income tax upon the income of a non-resident individual earned from business he conducted in that state which was primarily intrastate in nature.

With respect to the *West Publishing Co.* case, this Court affirmed in a per curiam opinion the decision of the California Supreme Court upholding the application of a California net income tax as applied to West Publishing Co. However, the following perceptive observation with regard to the significance and controlling effect of this case, was made by Professor Edward L. Barrett, Jr., Professor of Law at the University of California;[5]

> "In affirming the California decision the Court merely cited four prior cases, *none of which presented directly the problem of a net income tax on a corporation doing a wholly interstate business.*" (Emphasis supplied.)

In the case of *Memphis Natural Gas Co. v. Beeler*, supra, this Court upheld a tax on net income on the ground that the taxpayer was doing an *intrastate* business. It also stated, but purely by way of dictum, that the tax would be valid even if the business were wholly interstate. This specific language set forth as dictum in the *Beeler case* was expressly rejected by this Court in its subsequent decision in *Spector Motor Service, Inc. v. O'Conner*, 340 U. S. 602, 71 S. Ct. 508 (1951).

[5] *4 Vanderbilt Law Review* 520 (1951).

In an analysis of the effect and importance of *Oak Creek*, *Beeler*, and *West Publishing Co.*, with respect to the validity of a net income tax as applied to exclusively interstate commerce, Reuben Clark, Jr., in an article entitled "Interstate Commerce and a State's Right to Revenue: A Rejoinder," 30 Taxes 263, at p. 266, based upon his observation of this Court's decision in *Spector Motor Service, Inc.*, supra, states:

> ". . . Regally it ignored *West*, leaving interpretation of that baffling case for some later opportunity. *Oak Creek* and its kindred cases were referred to as evidencing no more than the principle that where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate—scarce recognition of the principle that the apportioned net income tax is valid per se, as applied to interstate commerce! The familiar language of *Beeler* was disowned as mere dicta; 'any suggestion in that opinion as to the possible validity of such a tax if applying to earnings wholly derived from interstate commerce is not essential to the case.' If the Court did not here have in mind the inherent similarity of all apportioned net income taxes—'privilege' and 'nonprivilege'—this footnote seems to be a most gratuitous aside." . . .

It is earnestly submitted that a review of this problem by this Court is imperative. Should this appeal be dismissed, as the State suggests, and certiorari be denied in the *Stockham Valves & Fittings*, Inc. case, arising out of the State of Georgia, foreign corporations carrying on an interstate business in Minnesota will find themselves subjected to a com-

pletely discriminatory tax levy solely because Minnesota happens to be one of the jurisdictions in which their interstate commerce is carried on. Such a situation would be untenable.

Respectfully submitted,

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Supreme Court of Georgia

Decided November 8, 1957

No. 19838

STOCKHAM VALVES & FITTINGS, INC.

v.

WILLIAMS, State Revenue Commissioner.

By the Court:

The Georgia Income Tax Statute (Code, Ann. Supp., § 92-3113) as applied to the plaintiff, a non-resident corporation with its home office and manufacturing plant outside of the State of Georgia, which maintained only a sales service office in this State which was used as headquarters by one of its sales representatives who spent about one-third of his time in that office or traveling within the State of Georgia, and in which office a small amount of office furniture, valued at approximately $1,000, was maintained, and one woman secretary was employed, and where the sales representative carried on the ordinary duties of a salesman in Georgia calling on customers and prospective customers, but no orders were accepted within the State of Georgia, and all sales were made on an "f.o.b. warehouse" basis and were completed at warehouses outside of the State of Georgia by deliveries to customers or to common carriers consigned to customers, violates both the commerce and due process clauses of the Federal Constitution, Code §§ 1-125(3) and 1-815, and the trial court erred in sustaining its validity as against such attacks.

This was an action brought by Stockham Valves & F tings, Inc., hereinafter referred to as plaintiff, against T. Williams, as Revenue Commissioner of the State of Georgi to recover income taxes paid by the plaintiff under prote to the State of Georgia for the calendar years 1952, 195 and 1955, assessed against the plaintiff under the followi Georgia Income Tax statutes: Code, Ann. Supp. §92-310 which provides "Every domestic corporation and every fo eign corporation shall pay annually an income tax equivale to four per cent of the net income from property owned from business done in Georgia, as defined in section 92-3113 and Code, Ann. Supp. §92-3113, which provides "The tax i posed by this law shall apply to the entire net income, as he in defined, received by every corporation, foreign or domesti owning property or doing business in this State. Every su corporation shall be deemed to be doing business within th State if it engages within this State in any activities or tra actions for the purpose of financial profit or gain, wheth or not such corporation qualifies to do business in this Stat and whether or not it maintains an office or place of doi business within this State, and whether or not any su activity or transaction is connected with interstate or forei commerce." Claims for refund of the taxes paid having be denied by the defendant the present suit was brought.

The plaintiff contends that all of its activities within t State of Georgia are a part of and inseparable from inte state commerce, and that any income tax assessed against t plaintiff is a direct burden on such commerce and violat the commerce clause of the Federal Constitution, Co §1-125(3); that the fact that the plaintiff maintains one sal service office in Georgia and one of its sales representativ

spends one-third of his time in Georgia does not make plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due process clause of the Federal Constitution, Code §1-815. No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable, but the plaintiff contends that the State of Georgia is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce.

The facts were stipulated, and the issue submitted to the trial judge without a jury, and to the judgment upholding the validity of the statute and the tax the plaintiff excepts.

From the stipulation of facts it appears that plaintiff is a corporation organized under the laws of Delaware with its principal or home office and its manufacturing plant located in Birmingham, Alabama. Plaintiff, since 1905, and including the tax years in question, has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of valves and pipe fittings which it manufactured. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham, Ala., Philadelphia, Pa., Chicago, Ill., Houston, Tex., and Vernon, Calif. It maintained established sales service offices at the foregoing locations and also at Cambridge, Mass., New York, N. Y., Atlanta, Ga., Pittsburgh, Pa., San Francisco, Calif., Washington, D. C., Dallas, Tex., and St. Louis, Mo. Purchasers of plaintiff's valves and pipe fittings were located in all the United States.

As a matter of policy and practice, during the tax years in question, plaintiff made sales only to established local wholesalers and jobbers and (except for sales to makers of automatic sprinkler system) made no sales directly to users and installers of valves and pipe fittings. The local wholesalers and jobbers who handled plaintiff's products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangement, to the distribution of plaintiff's products. Any established local wholesaler or jobber, having established credit was considered as a prospective customer and could buy from plaintiff. Established local wholesalers and jobbers who did buy from plaintiff were entirely free to discontinue buying from plaintiff at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

Plaintiff, during the years in question, made no sales on a consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession which was not available to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

All orders for plaintiff's products were contractually accepted or rejected at the home office of plaintiff in Birmingham, Alabama. No representative of the Company at any sales service office had any authority to, or did, contractually

accept or reject any order under any circumstances. Contractual authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the Company's home office in Birmingham directly from wholesalers and jobbers. Such orders as were received at sales service offices, or by the solicitation of sales representatives working out of sales service offices, were relayed by mail, telephone or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

Plaintiff had no plant or warehouse located in Georgia. All sales were made on an "f.o.b. warehouse" basis and were completed at the plant or warehouse by deliveries to customers or to common carriers consigned to customers.

Since 1950, and during the tax years in question, plaintiff maintained a sales service office in Atlanta. One of its sales representatives used this office as his headquarters. He worked in a territory which included Georgia, North Carolina, South Carolina and parts of Tennessee and Virginia. Part of Florida was also included in his territory until 1954. This representative spent approximately one-third of his time at the Atlanta sales office or traveling in the State of Georgia. The other two-thirds of his time was spent traveling outside of Georgia. He was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office.

Plaintiff also employed at its sales service office in Atlanta a full-time woman secretary. She functioned on the basis of her own knowledge and experience and literature furnished by the Company as a source of information concerning plain-

tiff's products. She performed stenographic and clerical duties and facilitated communications between plaintiff's home office in Birmingham, plaintiff's sales representative when he was out in the territory, and customers, prospective customers, contractors and users of plaintiff's products. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers or other people interested in plaintiff's products.

The Atlanta sales service office was listed in the Atlanta telephone directories in plaintiff's name in both the alphabetical and classified business listings. The office was listed in plaintiff's name in the Atlanta city directories. The Company, on its sales service office letterheads, in its catalogues and discount sheets, and on some promotional material, listed the fact that it maintained a sales service office in Atlanta. A small amount of office furniture was maintained there of the approximate value of $1,000. The representative carried on the ordinary duties of a salesman in Georgia. No orders were, however, accepted within the State of Georgia. All sales were completed at warehouses outside the State of Georgia by deliveries to customers or to common carriers consigned to customers. All such sales took place outside of Georgia.

At no time during the tax years in question did plaintiff qualify to do business within the State of Georgia; no officers or director of plaintiff was a resident of Georgia; the Atlanta sales representative was a resident of Georgia. During the tax years in question, rent, salaries and all other expenses of the Atlanta office were paid by check drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of plaintiff

in Georgia had authority, either alone or with any other person to draw checks upon or make withdrawals from any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office where they were reviewed and paid by checks. Plaintiff kept no bank account in the State of Georgia. All credit matters were handled at plaintiff's Alabama office where credit information was obtained and all credit questions passed on. All invoices were prepared and mailed from and all collections were made by plaintiff's office in Alabama. No employee of plaintiff in Georgia had authority nor did any employee accept any order, bind plaintiff to furnish goods, arrange credit terms, or make collections.

Hawkins, Justice: (After stating the foregoing facts.) That the decision of the questions here presented is not without difficulty is pointed out by the Supreme Court of the United States in the recent decision in Freeman v. Hewit, 329 U. S. 249, 252, (67 Sup. Ct. 274, 91 L. Ed. 265), where it is said: "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

In LeLoup v. Port of Mobile, 127 U.S. 640, 648 (8 Sup. Ct. 1380, 32 L. Ed. 311), the Supreme Court stated the fundamental limitations of the commerce clause on state taxation as follows: "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by

way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Forrester v. Culpepper, 194 Ga. 744, 748. (22 S.E. 2d 595), this court quoted with approval from Interstate Bond Co. v. State Revenue Commissioner, 50 Ga. App. 744, 751 (179 S.E. 559), the following: "The general view is that an income tax is not a property tax, but more in the nature of an excise tax." In Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 218 (45 Sup. Ct. 477, 69 L. Ed. 916, 44 A.L.R. 1219), a Massachusetts excise tax based on the proportion of a company's assets employed in the state and the proportion of its net income derived in the state was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. Taxpayer maintained a branch sales office in Massachusetts which was used as headquarters by its traveling salesmen. It owned office equipment there and its local manager handled petty cash items for the company through a bank account maintained in his own name. The court found that all of taxpayer's activities were an integral part of interstate commerce and therefore held the excise unconstitutional. The court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intra state business; but nothing there said was intended to modify well established principles. It must be read with the

essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state." In Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (71 Sup. Ct. 508, 95 L. Ed. 573), it is said: "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

From the foregoing statement of facts it appears without dispute that the plaintiff was engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned, and in Atlantic Lumber Co. v. Commissioner of Corporations and Taxation of Massachusetts, 298 U.S. 553, 555 (56 Sup. Ct. 887, 80 L. Ed. 1328), it was held: "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

Counsel for the defendant contend that a tax on net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce, but, as previously pointed out, we have held that an income tax is in the nature of an excise tax, and in the footnote added to the dissenting opinion written by Mr. Justice Reed in Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 677 (69 Sup. Ct. 1264, 93 L. Ed. 1613), it is said: "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the

doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned. In Ozark and Anglo-Chilean Nitrate the taxes were called franchise taxes; in Alpha it was labeled an excise tax." In Dennison Manufacturing Co. v. Wright, 156 Ga. 789 (3-b) 120 S.E. 120), this court held: "Where a foreign corporation rents and maintains an office in this state, with a stock of samples and a force of office employees and traveling salesmen, merely to obtain orders in this State and other States, subject to approval by its home office, for its goods to be shipped directly to its customers from its home State, such an arrangement is part of its interstate commerce, and not subject to a local excise tax."

We are also of the opinion that the income tax statute here under consideration as applied to the plaintiff, violates the due process clause of the Federal Constitution. We take it that no one will question the fact that a State may not tax activities carried on outside its borders without violating this provision of the Constitution. The question in every such case is whether such a connection exists between a business and the taxing State as to permit the imposition of a general income tax on a portion of the net income of the business, and in Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (61 Sup. Ct. 246, 85 L. Ed. 267), the Supreme Court said: "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." See also Miller Brothers Co. v. Maryland, 347 U.S. 340, 344 (74 Sup. Ct.

535), 98 L. Ed. 744), where the foregoing rule was applied to facts quite similar to those in the instant case. There the court said: "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." After referring to its previous decisions, that court said: "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This court, in Redwine v. Dan River Mills, Inc., 207 Ga. 381 (61 S.E. 2d 771), held that activities more extensive than those carried on by the plaintiff did not constitute "doing business" within the meaning of the income tax act then in effect, and in Suttles v. Owens-Illinois Glass Co., 206 Ga. 849 (59 S.E. 2d 392), it was held that accounts growing out of similar activities in Georgia did not have a tax situs in Georgia. See also Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (71 Sup. Ct. 377, 95 L. Ed. 517).

We hold therefore that as applied to the plaintiff the Georgia Income Tax Act violates both the commerce and due process clauses of the Federal Constitution, and the

trial court erred in rendering judgment against the plaintiff. The cases relied upon mainly by the defendant, namely, U. S. Glue Co. v. Town of Oak Creek, 247 U.S. 321 (38 Sup. Ct. 499, 62 L. Ed. 1135); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (41 Sup. Ct. 45, 65 L. ed. 165): Atlantic Coast Line R. Co. v. Doughton, 262 U.S. 413 (43 Sup Ct. 620, 67 L. Ed. 1051); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (62 Sup. Ct. 857, 86 L. Ed. 1090); West Publishing Co. v. McColgan, 27 Cal. 2d 705 (166 Pac. 2d 861), and others, are clearly distinguishable on their facts. In those cases the taxpayers were either residents of the taxing State, or were carrying on within the State extensive intrastate as well as interstate business, or else the statements therein made which would seem to conflict with the rulings here made were obiter. In Freeman v. Hewit, 329 U.S. 249, 255 (67 Sup. Ct. 274, 91 L. Ed. 265), the Supreme Court of the United States recognized that the taxing power permitted by the U. S. Glue Company case, supra, was only applicable to residents of a State. It said: "It (a State) can tax the privilege of residence in the State and measure the privilege by net income, including that derived fron interstate commerce." The Underwood Typewriter decision, supra, was explained and limited in Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 218 (45 Sup. Ct. 477, 69 L. Ed. 916, 44 A.L.R. 1219), where the court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was

intended to modify well-established principles." The dictum in the Beeler case, supra, was expressly disapproved as such by the Supreme Court in Spector Motor Service v. O'Connor, 340 U.S. 602, 609 (71 Sup. Ct. 508, 95 L. Ed. 573), in the following language: "Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As already pointed out by the United States Supreme Court, its decisions dealing with the problem here presented are spread through hundreds of volumes of its reports, and all of its pronouncements are not consistent or reconcilable. To attempt to harmonize all that has been said would neither clarify what has gone before nor guide the future, and to undertake here to point out the distinguishing features of each of the numerous decisions would only consume unnecessary time and space.

Judgment reversed. All the Justices concur except Head, J. who dissents.

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA,

Respondent,

vs. 36826

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

MOTION

Now comes the Appellant, Northwestern States Portland Cement Company, and based upon all the proceedings of record in the above entitled case, respectfully moves this Court for its Certificate setting forth that its decision in the above entitled case entered on September 10, 1957 was based upon the determination of a substantial and important federal question.

Dated this 6th day of December, 1957.

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Of Counsel:
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Saint Paul 2, Minnesota

Endorsed:
Filed Supreme Court
Dec. 12, 1957
Mae Sherman

IN THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA,

Respondent,

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

CERTIFICATE

On motion of the Appellant, Northwestern States Portland Cement Company, this Court, in addition to its decision and orders made herein, orders it to be certified and made part of the record in this case and of the judgment heretofore rendered herein, that in its appeal from the District Court of Hennepin County, Minnesota, and in the argument both oral and by brief, made in this Court, the Appellant raised and relied upon the assertion that the statute, Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1; coded as Minnesota Statutes, § 290.03, sought to be enforced by the Respondent, was repugnant to and void under the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. It is further certified that the issues as thus presented in this case, made it incumbent upon this Court, as part of its decision, to render

its determination with respect to a substantial and important federal question, namely, whether Respondent's enforcement of Minnesota Statutes § 290.03, [Minnesota Laws 1933, Chapter 405, Section 3; re-enacted and amended in Minnesota Laws 1937, Extra Session, C. 49, Sec. 3; re-enacted and amended in Minnesota Laws 1941, C. 550, Sec. 1; and re-enacted and amended in Minnesota Laws 1945, C. 410, Sec. 1,] was in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and the decision of the Court in this case is based in substantial part upon that determination. This certificate is not to be construed as a modification of the aforesaid decision.

Dated this 12th day of December, 1957.

SUPREME COURT OF MINNESOTA
ROGER L. DELL
Chief Justice

SUPREME COURT
Filed Dec. 12, 1957
Mae Sherman, Clerk

SUPREME COURT, U. S.

FILED
AUG 18 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE APPELLANT

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IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the State Supreme Court in this action has not as yet been officially reported. The opinion is unofficially reported at 84 N.W. 2d 373. For a copy of the opinion of that Court, the dissenting opinions and Judgment, see Record pp. 221 et seq. For copies of the District Court's (trial court's) Findings of Fact, Conclusions of Law and Order for Judgment dated August 31, 1955, and Memorandum attached thereto; Order for Amended Findings of Fact, Conclusions of Law and Order for Judgment, dated October 11, 1955; and Judgment dated November 4, 1955, see Record pp. 189 et seq.

JURISDICTION

The State of Minnesota initiated proceedings to collect state income taxes, penalties and interest from Appellant taxpayer, who defended on the ground that the statute under which the tax was sought to be imposed contravened the United States Constitution. The judgment from which this appeal is taken is the judgment of the State Supreme Court entered on September 10, 1957, following the decision of that Court upholding the validity of the statute rendered on June 14, 1957. A timely petition for reargument was filed by appellant on July 25, 1957, and was denied by the Minnesota Supreme Court on August 28, 1957. Notice of Appeal was filed by appellant in the State Supreme Court on September 12, 1957.

The jurisdiction of the Supreme Court of the United States to review the decision and judgment of the State Supreme Court by direct appeal is conferred by *28 U.S.C. 1257 (2) and 2101 (c)* and is sustained by the following cases: *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954); *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 425 (1952); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946). In *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945), the court stated (p. 185):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

Probable jurisdiction was noted January 6, 1958.

QUESTIONS PRESENTED

A. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Due Process Clause of the Fourteenth Amendment of the Constitution of the United States* insofar as under its provisions the State of Minnesota seeks to impose a tax on the income of a foreign corporation whose only activity within the State of Minnesota is the solicitation of orders for sales which are consummated exclusively without and beyond the boundaries of the State of Minnesota?

B. Is Section 290.03 of the *Minnesota Statutes* (and its predecessor sections) in conflict with and thus invalid and void under the *Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States* insofar as it is sought to impose a tax on the net income of a foreign corporation whose business consists exclusively of interstate commerce?

STATUTE INVOLVED

The pertinent statute involved in this action now appears as Section 290.03 of the *Minnesota Statutes.* The statutory history of this section is set forth and attached hereto as Appendix "A". Its provisions insofar as are applicable are as follows:

> "290.03. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state *or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;*" (emphasis supplied)

STATEMENT OF CASE

During the years here involved, the Northwestern States Portland Cement Company, the appellant in this proceeding, existed under and by virtue of the corporation laws of the State of Iowa and its principal offices and place of business were in Mason City, Iowa (R. 189, f. 1).

Appellant is not now and was not during the years invloved in this action authorized under the applicable statutes of the State of Minnesota to transact business in that state and it filed no income tax returns with the Commissioner of Taxation of the State of Minnesota for any of its taxable years (R. 189, f. 2). There is no indication that the State of Minnesota has ever demanded that the taxpayer qualify as a foreign corporation doing business in the State as the Minnesota Statutes require in the case where a foreign corporation is doing business within the state (see *Minnesota Statutes*, Sec. 303.03).

The State of Minnesota, acting through the Commissioner of Taxation of the State of Minnesota, prepared income tax returns for the appellant for its fiscal years 1933 through 1948 inclusive on the basis of information available to the Commissioner of Taxation and assessed the income taxes shown to be due by said returns. All of the taxes so assessed are in issue here (R. 189, f. 3). The appellant operated on a fiscal year basis with its fiscal year ending on November 30th (R. 189, f. 2).

During the years material hereto, appellant was engaged in the manufacture and sale of cement (R. 191, f. 1). Its home office and plant were located in Mason City, Iowa (R. 191, f. 1). It maintained only one office in the State of Minnesota, such office being located in the Roanoke Building in Minneapolis, Minnesota, and occupied under a lease

that was negotiated and paid for from the home office in Mason City, Iowa (R. 191, f. 1). Appellant owned no real estate in Minnesota and its only personal property in this state was its salesmen's automobiles, its office furniture and fixtures and a small amount of supplies and goodwill advertising material located in its Minneapolis sales office (R. 191, ff. 1-2). This office consisted of three small rooms and the personal property therein consisted of three desks, two filing cabinets, a typewriter and some chairs (R. 191, f. 2).

During the years involved in this proceeding, appellant had at the most no more than six employees residing and working in the State of Minnesota (R. 191, f. 3). Two salesmen and a secretary were its only employees operating out of its Minneapolis office (R. 191, f. 3). The other employees of appellant in this state operated directly out of their homes (R. 191, f. 3). All employees residing or working in Minnesota were hired by supervisory personnel at appellant's home office in Mason City, Iowa (R. 191, f. 3). No employee in the State of Minnesota had at any time any authority to hire or fire any other employee (R. 192, f. 1).

All personal property located in the State of Minnesota during the years involved was bought and paid for out of appellant's home office in Mason City, Iowa (R. 192, f. 1). All supplies except postage stamps used in Minnesota were requisitioned and obtained directly from appellant's home office at Mason City (R. 51, f. 1). None of appellant's employees in Minnesota had authority to purchase supplies other than postage stamps (R. 51, f. 1). Appellant did not maintain a bank account in Minnesota and no petty cash fund was maintained in this state (R. 192, f. 2). All salaries paid to employees in Minnesota were fixed by the sales mana-

ger in Mason City, Iowa, and were paid directly from the home office in Iowa (R. 192, f. 2).

Appellant's salesmen in Minnesota were reimbursed directly from the Mason City office for customer entertainment expense incurred by them (R. 192, f. 2). They were on a straight salary basis and received no commissions (R. 192, f. 3). Vacation policies for all employees were established by the home office at Mason City (R. 192, f. 3). The territories of its salesmen in Minnesota were allocated by the home office and no authority to reallocate these territories was given to any of appellant's employees in Minnesota (R. 192, f. 3). Appellant maintained two telephone lines in its Minneapolis office and was listed in the Minneapolis telephone directory (R. 192, f. 3). All telephone bills were paid directly by the Mason City home office (R. 193, f. 1).

The Minneapolis office was used as a forwarding center for orders that customers telephone or wrote in (R. 57, f. 2). All orders received by appellant's salesmen in the State of Minnesota were transmitted daily to the home office in Iowa where exclusively they were passed upon for acceptance or rejection (R. 57, f. 2; R. 118, f. 2). All orders received from its salesmen in Minnesota were acknowledged by it from its home office in Mason City directly to the customers (R. 60, f. 3). All sales contracts were executed on its behalf at its Mason City office and were sent directly to the customers involved (R. 64-65). No employees in Minnesota had authority to accept or reject a customer's order or to pass or approve on a customer's credit (R. 194, f. 2). Credit extensions and collections were handled exclusively by the home office in Mason City and none of its salesmen has ever been authorized to handle such matters (R. 194, f. 2). All claims for loss or damage were handled and approved exclusively also by the

home office at Mason City (R. 117, f. 3). Appellant's employees in Minnesota had no authority to make any adjustments of any kind (R. 78, f. 1).

All merchandise sold by appellant was invoiced and shipped by rail from the home office at Mason City directly to its purchaser (R. 195, f. 3). The purchasers were located in the states of Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin (R. 195, f. 3). Appellant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no such merchandise was stored or kept by it in this state (R. 195, f. 3). All price quotations were prepared and sent out directly to the customers from the home office in Mason City, Iowa (R. 73-74), and all changes in price were prepared by that office (R. 195, f. 3). Prices were quoted at the mill site rate (i.e. F.O.B.) at Mason City, Iowa, to which was then added, for the purchaser's convenience, the freight to the purchaser's place of business to reach the total cost to the purchaser (R. 76, ff. 1-2). Any freight included in excess of the actual freight charged by the carrier was refundable to the purchaser under the terms of the sales contract (Exs. 4, 5 and 8).

Appellant's activities in Minnesota consisted only of solicitation and the good will promotion incidental thereto (R. 196, ff. 2-3). All orders for merchandise were accepted or rejected exclusively at its home office in Mason City, Iowa, and all orders that were accepted were filled and delivered in interstate commerce to a common carrier by rail by appellant at and from its home office and plant in the State of Iowa (R. 196, ff. 2-3). Appellant's activities in Minnesota were an integral and inseparable part of its interstate business and all revenues received by appellant from customers located in Minnesota resulted from appellant's operations in interstate commerce (R. 194, f. 3; finding No. X).

In face of the foregoing facts the claim was made that part of the income earned by taxpayer was taxable by Minnesota. Upon the taxpayer's refusing to file returns, the Commissioner of Taxation for the State of Minnesota prepared the returns in his own office and caused them to be filed (R. 27-30). When the taxpayer failed to pay the tax shown in these returns, the State commenced this action to collect the tax (R. 1-20). In the preparation of such returns the Commissioner used the so-called three factor formula described in *Minnesota Statutes* 290.19 in determining the portion of the appellant's over-all net income for each of its fiscal years involved which was to be allocated to Minnesota and subjected to the income taxes imposed by this state (R. 190, f. 1). The three factors specified in this statutory formula are (1) the ratio of the taxpayer's sales made in Minnesota during the year to its total sales for the year wherever made; (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year (R. 190, f. 1).

For the fiscal year ending November 30, 1948, the most recent year in issue in this proceeding, the taxpayer had net income (as appears in Exhibit P) of $852,897.74, after all deductions. Part of this, that is the sum of $12,667.57, according to the schedule M (1) of that exhibit, was non-apportionable income and not claimed to be taxable by the State of Minnesota in Minnesota because it arose from rents of tangible property located outside the state, and interest. The balance of the income was claimed by the State of Minnesota to be apportionable to the State of Minnesota and was apportioned in the following manner:

COMPUTATION OF APPORTIONMENT PERCENTAGE

Tangible Property Used

Averages (1)	Within Minnesota (2)	Total (3)	Ratio of Within Minn. to Total (4)
Land		$2,396,422.20	
Equipment	$ 3,316.12	23,732.22	
Furniture and Fixtures	500.00	1,949.65	
Stocks finished, in process, etc.		311,260.23	
Supplies		607,276.65	
Total Tangible Property Used	$ 3,816.12	$3,340,640.95	.1142%
Payroll			
Total Payroll	$ 25,748.05	$1,561,973.95	1.6484%
Sales			
Total Sales	$2,314,916.18	$4,778,222.80	48.4493%
Total			50.2119%

Arithmetic Average under Sec. 290.19 Subd. 1 (1) (a) (b) (c) (Divide total of Item (d) by 3) 16.7373%

DETERMINATION OF TAXABLE NET INCOME

Total Net Income (Item 26, Page 1)	$852,897.74
Non-Apportionable Net Income (Item M-1, Col. 2 above)	12,667.57
Apportionable Income (See Instructions below)	840,230.17
Per Cent to Minnesota (Item M-3 (e) above, or Item M-3 (f) above)	16.7373%
Amount to Minnesota (P times O)	140,631.84
Minnesota Non-Apportionable Net Income (Item M-1, Col. 1 above)	
Minnesota Taxable Net Income (Enter as Item 27, Page 1)	140,631.84

The tax claimed to be assessable by the State of Minnesota for the fiscal year ending November 30, 1948, was computed on the income of $140,631.84, which amount was apportioned under the above computations to Minnesota.

The foregoing computation is typical of the method followed by the State of Minnesota for each of the years in question.

In applying this formula in computing the taxes to be assessed against the appellant for the years involved, the Commissioner treated all shipments which appellant made to Minnesota buyers as being sales made within the state without regard to the fact that all such sales were made in interstate commerce and were in every instance accepted, filled and delivered by appellant at and from its office and plant in the State of Iowa (R. 37-41). As a matter of practice appellant's solicitors in Minnesota seldom took an order. Generally orders were written up directly on the customers' purchase order form and sent into Mason City by the customer. Also in many cases they were telephoned or wired in (R. 33-41, 127, 128).

The income taxes, penalties and interest assessed against the defendant for its fiscal years ended in 1933 through 1948 and adjudged in the proceedings below to be payable by the appellant are as follows (R. 190, f. 3):

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	$ 806.48	$ 40.32	$ 512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

The Supreme Court of Minnesota, by a divided court (5 to 2), upheld the action of the Minnesota District Court in sustaining the tax against the claim that its imposition violated the due process clause of the Fourteenth Amendment, and the commerce clause (Art. I, Sec. 8, Cl. 3), of the Constitution of the United States.

SUMMARY OF ARGUMENT

I

The Minnesota Statute Imposing a Tax on the Appellant Is in Conflict With and Contravenes the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The State of Minnesota, under an income tax act enacted in 1933, in this proceeding seeks to impose a tax upon the net income of the appellant, an Iowa corporation, not qualified to do business in Minnesota, whose sole business in the State of Minnesota is that of engaging in interstate commerce. The tax sought to be levied here is for the years 1933 through 1948. As to the first year, it is now 25 years since the law was enacted. Appellant, who manufactures cement, has its plant and general office in Iowa. All of its sales are accepted or rejected in that state and all deliveries of merchandise ultimately ending up in Minnesota are made to railroad carriers in Iowa for shipment. Its sole activity in Minnesota is that of soliciting sales in interstate commerce.

Soon after the adoption of the Fourteenth Amendment this Court held that its due process clause restricted the power of a state to impose taxes on subjects not within the jurisdiction of the taxing government. Since *Union Refrigerator Transit Company v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905), this Court consistently held that any attempt to transcend these limits and to extend the taxing authority

beyond the state's jurisdiction constitutes the taking of property without due process of law and is in violation of the Fourteenth Amendment.

In case after case it has been held that mere solicitation of orders in interstate commerce does not provide the "local incidents of operation" which enable a state to tax a foreign corporation which in all other respects stays at home. See *Norton Co. v. Department of Revenue of State of Illinois,* 340 U.S. 534, 71 S. Ct. 377 (1951); *West Point Wholesale Grocery Co. v. City of Opelika,* 354 U.S. 390, 77 S. Ct. 1096 (1957). To uphold the statute under which this tax was levied would constitute a complete departure from those decisions.

II

The Attempt of Minnesota to Impose a Tax Upon the Net Income of the Appellant, a Foreign Corporation, Not Qualified to Do Business in Minnesota and Whose Business Consists Exclusively of Interstate Commerce, Violates the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

The statute here in question, by its very terms, imposes a tax upon the net income of a foreign corporation "whose business within" Minnesota "consists exclusively of * * * interstate commerce * * *".

The trial court, in an unchallenged finding, specifically determined that all of appellant's activities "were an integral part of interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce."

In the area of state taxation, this Court has continuously upheld the basic principle embodied in the commerce clause that its purpose is to prevent the interference with, discrim-

ination against, and undue burdening of interstate commerce. See *Brown v. Maryland*, 12 Wheat. 419 (1827); *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925).

Sound logic and reason support this view for there is the always present danger that the 48 states, each of which is a taxing district, will if left uninhibited, tax and tax and tax until such time as commerce between the states would of necessity cease.

The statute involved here is so designed that it could easily lead to multiple taxation of interstate commerce, a burden not imposed upon purely local or intrastate commerce. Even though it may be conceded that interstate commerce must pay its way, a tax upon net income produced exclusively from interstate commerce is capable of being imposed by every state which that commerce touches. Interstate commerce thus will be compelled to pay more than its way. This Court, in prior decisions, has established a pattern of permissive state taxation which will not burden interstate commerce more than local commerce. Examples of such permissive forms of taxation are the sales and use taxes which now are one of the principal sources of revenue of most states. Adherence by this Court to its prior decisions prohibiting a direct tax upon interstate commerce will have the effect of the continuance of the nationwide area of free trade essential to this country's economic welfare. A departure from those decisions will allow each state to establish its own barriers to interstate commerce by the simple expedient of imposing its own tax at its own special rate and under its own formula and there will be no such area of "free trade among the several states", as there has been in the past.

ARGUMENT

I

The Minnesota Statute Imposing a Tax on the Appellant Is in Conflict With and Contravenes the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In a union of 48 sovereign states, for the common good and benefit, it is necessary that an individual state be restricted in the exercise of its taxing power to subjects with which such state has a substantial and jurisdictionally significant relationship. Soon after the adoption of the Fourteenth Amendment this Court held that its due process clause restricted the power of a state to impose taxes on subjects not within the jurisdiction of the taxing government. Thus, in the case of *Union Refrigerator Transit Co. v. Kenutcky,* 199 U.S. 194, 26 S. Ct. 36 (1905), the court quoted with approval from *Louisville & J. Ferry Co. v. Kentucky,* 188 U.S. 385, 23 S. Ct. 463 (1903), as follows:

> "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

Since the *Union Refrigerator Transit Company* case, this Court has consistently held that any attempt to transcend these limits and to extend the taxing authority beyond the state's jurisdiction constitutes the taking of property without due process of law and is in violation of the Fourteenth Amendment.

The question of jurisdiction to impose taxation must be sharply distinguished from the question of jurisdiction to

render an *in personam* judgment by the courts of a given state. Jurisdiction to render an *in personam* judgment arises when there exists between the state and the party against whom judgment is sought certain minimum contacts so that traditional notions of fair play and substantial justice are satisfied.[1] In determining questions of jurisdiction to tax under the due process clause it must be considered whether there exists a substantial relationship between the state and the subject of the tax, and there must also be considered the relationships between the subject and other states of the Union.

The statute under which Minnesota seeks to levy this tax provides:[2]

> "An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby

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[1] In *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1954) this Court pointed out that due process insofar as *in personam* jurisdiction is concerned required only that there be certain minimum contacts so that the service of process would not offend "traditional notions of fair play and substantial justice". It should be noted with respect to the *International Shoe* decision that the tax involved was levied under the Washington Unemployment Compensation Act on the salaries paid by the taxpayer to the solicitors it had operating in the state. In other words, as the Supreme Court carefully pointed out (326 U.S. 320):

> "The obligation which is here sued upon arose out of those very activities [which taxpayer admittedly carried on in the state]."

Under such circumstances, the Supreme Court concluded (326 U.S. 320) that it could not find an abuse of due process in the Washington court's conclusion, as quoted above, that jurisdiction existed to collect the unemployment tax on the salaries paid to taxpayer's solicitors in Washington. Such, of course, is not the situation in the case at bar since here the tax sought to be collected has no relationship to the presence in Minnesota of appellant's solicitors but is, instead, on the sales income realized by appellant on the acceptance of orders, and delivery of merchandise in the State of Iowa.

[2] For the legislative history of this statute since its first enactment in 1933, see Appendix A.

imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under Sec. 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both; * * *"

This statute purports to levy a tax on the net income of a foreign corporation engaged exclusively in interstate commerce. As applied to the taxpayer in this case, the state seeks to levy a tax on the net income of the taxpayer whose activity within the state of Minnesota is restricted solely to the solicitation of interstate sales.

In this case, as the trial court found (R. 196, ff. 1, 2), appellant taxpayer's manufacturing activity and all its contracts for the sale of its goods were executed and performed in Iowa. Its delivery of merchandise to its Minnesota customers was all to railroad carriers in Iowa. Its activity in Minnesota was, at the most, no more than "drumming activity" and was so described by the trial court (R. 199, f. 2). This activity in Minnesota consisted solely of sales promotion and in some instances solicitation of orders for acceptance out of the state.

The law is well established that the mere solicitation of orders does *not provide the "local incidents of operation" which enable a state to tax a* foreign corporation which, in all other respects, stays at home.[3]

In *Norton Co. v. Department of Revenue of State of Illinois*, 340 U.S. 534, 537, 71 S. Ct. 377 (1951), the Court stated:

"Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers

[3]See also *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S. Ct. 436 (1938); *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, 77 S. Ct. 1096 (1957).

to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023."

In *Nippert v. City of Richmond*, 327 U.S. 416, 423, 66 S. Ct. 586 (1946) the Court said:

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

In the very recent case of *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 74 S. Ct. 535 (1954) this Court struck down a Maryland excise tax on "the use, storage or consumption" of articles of commerce insofar as Maryland attempted to impose the responsibility of collection upon a Delaware corporation which made sales to Maryland residents in Delaware. Maryland sought to sustain its tax on the ground that the Delaware company's newspaper and radio advertising reached Maryland inhabitants, that sales circulars were mailed to Maryland customers, and some goods were delivered by the Delaware company's trucks to Maryland locations. (Solicitation by television or radio is merely "drumming" in the latest fashion). This Court held that the attempted imposition was without any juris-

dictional basis and therefore repugnant to the Fourteenth Amendment. The logic of this Court's reasoning there is unassailable.

> "* * * Our decisions are not always clear as to the grounds on which a tax is supported. * * *. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U.S. 344-345)

Applying these principles to the facts of the case at bar, it is clear that appellant was not subject to the taxing jurisdiction of Minnesota. There are no local incidents or activities of appellant's business which would serve as a base upon which to impose the levy here. The taxpayer remained beyond the confines of the state for all purposes, except, at the most, the mere solicitation of orders in interstate commerce. Those orders ripened into contracts of sales only when received and accepted at the home office. Delivery of the merchandise was effected by delivery to a common carrier by rail in Iowa. The merchandise never came to rest enroute.

Appellant owned and maintained no property in the State of Minnesota except some insignificant office equipment, drummer's supplies and automobiles, all of which were wholly incidental to and for the necessary use of its solicitors in their drumming work. Being an integral part of the solicitation, such items cannot constitute a basis for the tax.

The evidence in this case indicates that 48% of appellant's total shipments, deliveries of which were made to a common carrier in Iowa, ultimately came to rest in Minnesota. The majority of the Minnesota Supreme Court bottomed its decision on that fact. That court would establish a totally

new concept of trade and commerce between the states. Under the Minnesota Supreme Court's decision, if the volume of shipments from one state into a neighboring state is a substantial portion of the shipper's total volume, such commerce in effect becomes "localized" and thus "separated" from ordinary interstate commerce. The Minnesota Supreme Court did not attempt to delineate the precise volume or percentage of total shipments that would be necessary to effect this localization or separation from commerce. But, presumably, at some point, a less extensive volume or percentage of shipments between two neighboring states would be entitled to the protection of both the due process and the commerce clause. It would seem fundamental that no quantity or regularity could turn a purely interstate business into a local or intrastate one.

Had appellant been engaged in intrastate activities in Minnesota instead of confining itself solely to solicitation, such intrastate or local activities might well have been claimed by Minnesota taxing authorities as a springboard from which a tax could constitutionally have been imposed on appellant's carrying on of such local business.

Unquestionably, a tax so imposed could constitutionally be measured by appellant's net income wherever earned if properly apportioned to this state. The principle is well established that where a taxpayer is engaged in both intrastate and interstate commerce, a state may constitutionally impose a tax on the privilege of carrying on the intrastate business and may compute the amount of such tax by applying the tax rate to a fair proportion of the taxpayer's entire business done within the state, both interstate and intrastate.[4] It was so held in *International Harvester Co. v.*

[4] Such also is the rule insofar as ad valorem property taxes are concerned. See for example *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct. 432 (1949).

Evatt, 329 U.S. 416, 67 S. Ct. 444 (1947) where the taxpayer owned and operated two large factories, four branch selling establishments, four warehouses, and fourteen retail stores within the taxing state. Similarly in *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S. Ct. 701 (1942) the taxpayer maintained a wholesale distributing house, with its own stock of goods, salesmen, credit and collection services, etc. within the taxing state. A similar situation existed in *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 60 S. Ct. 273 (1939), where assembly plants were located within the taxing state. In *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S. Ct. 246 (1940) the taxpayer had qualified as a foreign corporation to carry on a local business within the state and its local business and property interests were extensive. So, too, in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1475 (1948), and in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 62 S. Ct. 857 (1942), the actual doing of business and the ownership of extensive property within the state was not disputed. These cases are obviously no support for the State's position here.[5]

[5]See also *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, 298 U.S. 553, 56 S. Ct. 887 (1936); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260 (1948); *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S. Ct. 1264 (1949); *West Publishing Co. v. McColgan*, 328 U.S. 823, 66 S. Ct. 1378 (1946). The commerce clause is probably the only issue in the latter case, for more than solicitation was present. The salesmen were authorized to receive payments on orders taken, to collect delinquent accounts and to make adjustments. See 27 Cal. (2d) 705; 166 P. (2d) 861. *Field Enterprises, Inc. v. State of Washington*, 47 Wash. 2d 852, 289 P. 2d 1010, aff'd 352 U.S. 806, 77 S. Ct. 55 (1956) is similar to *West Publishing Co.*, except the local activities appear to be greater in the former. For example, the many salesmen (410) working out of the Seattle office of Field Enterprises could and usually did make collections, take down-payments and had authority, although not often exercised, to accept orders. The tax involved was on gross receipts which

Here there are no intrastate incidents, links or connections of any sort which constitutionally would enable Minnesota to impose this tax. As stated by this Court at pp. 392, 393, in *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952):

> "* * * a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce."

The attempt of Minnesota to exact this levy is no different than if Minnesota sought to impose an ad valorem property tax on real estate lying wholly without its borders and owned by a non-resident.[6] If the real estate were owned by a resident, then perhaps due process would not prohibit an income tax on the income from the realty for then there is some definite link in that the taxing state is affording a domicile to the person receiving the income. See *Lawrence v. State Tax Commission of State of Mississippi*, 286 U.S. 276, 62 S. Ct. 556 (1932). Conversely Minnesota could tax income if earned within the state from a local business even though the business were owned by a nonresident. See *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920). In each of the latter two instances, however, there is a def-

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were fairly allocated so that they could not be subject to a duplicate tax by any other state. The taxpayer also had district managers with power to select and employ salesmen, which in effect amounted to managerial authority.

[6] *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905); *Frick v. Pennsylvania*, 268 U.S. 473, 45 S. Ct. 603 (1925).

finite link between the taxing state and the taxpayer which can be claimed to form a basis or subject matter for the tax.

The necessity of some such definite link was succinctly summed up in the following observation of Justice Frankfurter in *State of Wisconsin et al v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S. Ct. 246, 250 (1940):

> "'Taxable event', 'jurisdiction to tax', 'business situs', 'extraterritoriality', are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

We may well ask, "What has Minnesota given this taxpayer for which it may ask a return?" First, it permitted the ownership of automobiles. For that, however, the State has received a license fee at the same rate it charges residents of the State of Minnesota. If the tax sought to be imposed here is for the ownership of those automobiles, then obviously it discriminates against a non-resident. Next, the State of Minnesota has allowed the taxpayer to lease a small office in which it has a few hundred dollars worth of office furniture on which the State has levied and collected a personal property tax. Obviously again, if the $100,000 demanded here is because of the ownership of this personal property then, too, the levy is discriminatory as against a non-resident. What next then has Minnesota given this taxpayer for

which it is entitled to collect a judgment of over $100,000? The answer is, nothing.

Here the trial court found that appellant's:

> "* * * activities in this state were an integral part of its interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce." (Finding No. X, R. 194, f. 3)

The foregoing finding has not been challenged. The Supreme Court of Minnesota in the very first sentence of its majority opinion stated: "Defendant taxpayer, a foreign corporation [*is*] engaged exclusively in interstate commerce, * * *" There are no intrastate activities. Minnesota has not afforded this taxpayer any business opportunities, protection or benefits. The commerce carried on in Minnesota is a right that this taxpayer has by virtue of its being a member of the community of states forming the United States of America.

Undoubtedly Minnesota has attempted to give extraterritorial effect to its income tax law. This follows from the fact that there is a complete lack of local or intrastate incidents upon which a tax can be based.

The Minnesota Supreme Court, in the majority opinion in this case, describes or defines the tax as follows:

> "It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative intent, or by operative effect be construed or classified as an excise, franchise, or privilege tax."

In fact the Supreme Court of Minnesota does not actually specify the nature of the tax but rather what it is not. Under the Court's own definition the levy sought to be imposed cannot be sustained as a tax in lieu of an ad valorem tax

on the property of the taxpayer located within the state, for the Court specifically says that it is not a "substitute for any other tax."

If Minnesota has afforded this taxpayer no opportunities or benefits other than those guaranteed by the Federal Constitution, and it is clear that it has not, then farther search must be had for a taxable subject if this levy is to be upheld. The only possible items upon which any kind of a tax could be imposed would be Northwest's franchise, its sales, its property or pure interstate commerce.

The company is not a Minnesota corporation nor qualified to do business in Minnesota. The Supreme Court of Minnesota quite rightly recognized that the tax could not be an excise, franchise or privilege tax for Minnesota afforded this company no franchise or privileges.

The main office, the plant, and all of the company's tangible property (with the exception of the small amount on which Minnesota levies a personal property tax), are all located in Iowa. To permit Minnesota to levy this annual tax because of that property obviously would attribute to the Minnesota taxing statutes extraterritorial application.

In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36 (1905), this Court held that it was contrary to the due process clause for the State of Kentucky to levy against a domiciliary corporation within the State of Kentucky a personal property tax upon tangible property permanently located in other states.

A case on all fours with the facts of this case is *Alpha Portland Cement Company v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925), where this Court observed:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her

borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction."

The tax here imposed would be no less repugnant to the due process clause of the Fourteenth Amendment if it were claimed that it was imposed on the sales accepted or rejected in Iowa. A very similar question involving a sales tax was considered in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023 (1944). There this Court held unconstitutional the attempted application of the Arkansas sales tax to transactions made by a Tennessee corporation with home office and place of business in Memphis. There the sales were solicited in Arkansas through traveling salesmen. There orders required acceptance by the Tennessee office and all goods were shipped from Tennessee, title passing upon delivery to the carrier in Memphis.[7]

This Court, in overturning the Arkansas tax, observed (322 U.S. 330):

"For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries."

Unquestionably to permit Minnesota to use sales made in Iowa as the subject matter of the tax would be in com-

[7]Here the same is true. The orders were accepted or rejected in Iowa and title passed upon delivery to the carrier in Mason City, Iowa. All shipments were made by rail. Under neither the Iowa nor the Minnesota statutes was it appellant's merchandise once it was delivered to the carrier. *Iowa Code* 1950, Section 554.47; *Minnesota Statute*, Section 512.46. The Minnesota Supreme Court observed in *Ammon v. Illinois Cent. Ry. Co.*, et al., 120 Minn. 438, 139 N.W. 819 (1913):

"The consignee of a shipment is presumed to be the owner of it. The possession of the carrier is presumptively his possession."

See also *Banik v. Chicago M. & St. P. Ry. Co.*, 147 Minn. 175, 179 N.W. 899 (1920).

plete disregard of the due process clause of the Fourteenth Amendment.

By process of elimination there are then no intrastate incidents, activities, subject matter, links or connections of any kind within the boundaries of the State of Minnesota.

The findings made by the trial court in this case were that the solicitation here was "an integral part" of interstate commerce.

If such solicitation alone is to constitute the subject upon which a tax is imposed, then there is no limit beyond which state taxation may expand. Solicitation today is not restricted to the old style door-to-door canvassing or to the use of solicitors going from one business to another as was done here. It may take a more intangible form. Thus it may be done exclusively through national magazine advertising such as in the case of the Book-of-the-Month Club; or perhaps by catalog, as in the case of the mail order house; or perhaps by long distance telephone, or radio, the range of which extends for thousands of miles. Today the most modern method of solicitation is through the use of national television programs originating in Hollywood and reaching into every living-room in the State of Minnesota. Will it be urged here that Minnesota can impose this tax because this taxpayer sent its selling message through solicitors rather than through the use of television beamed from without Minnesota? In each case, pure solicitation is involved and nothing more. If solicitation is to become the base for income taxation, then obviously Minnesota is not precluded by reason of due process from taxing all companies selling on a national basis whose product reaches Minnesota, even though no representatives of the company may ever step foot on Minnesota soil. Under present day marketing techniques no semblance

of commercial order among the 48 states can be maintained unless strict adherence is had to the requirements of the due process clause. With new marketing trends, incorporating expanding methods of communication, the functions of the due process clause are more important than ever before. The constantly increasing appetite of the state governments for more and more sources of revenue make even more essential that this court prevent overreaching by any state, including Minnesota.

II

The Attempt of Minnesota to Impose a Tax Upon the Net Income of the Appellant, a Foreign Corporation, Not Qualified to Do Business in Minnesota and Whose Business Consists Exclusively of Interstate Commerce, Violates the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Article I, Section 8, Clause 3 of the Constitution of the United States provides that Congress shall have the power

> "To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."

This clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force, it creates an area of trade free from interference by the states. In short, it is a limitation upon the state's authority absent implementing legislation by Congress. *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946).

The statute here in question, by its very terms, imposes a tax upon the net income of a foreign corporation "whose business within" Minnesota "consists exclusively of * * * interstate commerce * * *."

The trial court, in an unchallenged finding, specifically determined that all of appellant's activities "were an integral part of interstate activities, and all revenue received by it from customers in Minnesota resulted from its operations in interstate commerce" (R. 194, f. 3; R. 216, f. 3). The Minnesota Supreme Court, in its opinion stated that the trial court's findings were sustained by the evidence.

The regulations issued by the Commissioner of Taxation of the State of Minnesota and, in effect, approved by the State Supreme Court, provide in part as follows:

> "All corporations, domestic or foreign whose business within this State during any taxable year consists exclusively of interstate commerce, are subject to a tax imposed directly upon their taxable net income under the provisions of M.S.A. 290.03 (1)." *Minnesota Income Tax Regulations*, §2003 (1).

As applied to foreign corporations not qualified to do business in Minnesota the statute should be void on the face of it. The regulations promulgated thereunder make this even more conclusive.

In the area of state taxation, this Court has continuously upheld the basic principle embodied in the commerce clause that its purpose is to prevent the interference with, discrimination against, and undue burdening of interstate commerce.[8]

Sound logic and reason supports this view for there is the always present danger that the 48 states, each of which is a taxing district, will if left uninhibited, tax and tax and tax

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[8] *Brown v. Maryland*, 12 Wheat. 419 (1827); *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 7 S. Ct. 592 (1887); *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147, 38 S. Ct. 295 (1918); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946); *Nippert v. City of Richmond*, 327 U.S. 416, 66 S. Ct. 586 (1946); *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925).

until such time as commerce between the states would of necessity cease.

For example, let it be assumed in this very case that this taxpayer was a Minnesota corporation with its plant in Minnesota and that it carried on its activities in Iowa in exactly the same manner as the taxpayer here carries on its activities in Minnesota. The effect then under the Minnesota income tax act would be to allocate property, payroll and sales (the three factors which Minnesota uses under its allocation formula) for 1948 as follows (Ex. P):

	Within Iowa	Total	Ratio of Within Minn. to Total
(a) Taxable Property	$ 3,816.12	$3,340,640.95	99.8858
(b) Payroll	25,748.02	1,561,973.95	98.3516
(c) Sales	None	4,778,222.80[9]	100.000
			298.2374
(e) Arithmetic average under Sec. 290.19 Subd. 1 (1) (b) (c) Minn. Satutes, equals			99.424 percent

In other words, 99.424 percent of its income would be taxed under the Minnesota law to Minnesota. As a matter of practice this is exactly what Minnesota does in such situations.[10] Yet when an Iowa corporation, with its plant, its office, and all of its sales in Iowa, engages exclusively in interstate commerce in Minnesota, this state's taxing authorities claim also the right to tax a portion of that corporation's income. That is the situation involved in this proceeding. This state of facts clearly demonstrates that a net income tax can be a real burden on interstate commerce.

[9] All sales would be allocated to Minnesota because all orders would be accepted and filled in this State. See *Minnesota Statutes* 290.19 and the Regulations promulgated thereunder. Appendix B.

[10] See *State of Minn. v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N.W. 2d 664 (1956).

Perhaps when income tax rates were insignificant, the observation made by this Court in 1918[11] that "*the difference in effect* between a tax measured by gross income and one measured by net income * * * is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is indirect or incidental," was sound. However, since 1918, a great change in rates has occurred. Then the federal tax rates on corporations was only two percent and the Wisconsin rate two percent. Now the federal rate is 52 percent. The Minnesota rate is over seven percent.

During the World War II period, which includes a number of the years involved in this very proceeding, the aggregate federal corporate normal tax, surtax and excess profits tax rate was as high as 95 percent.[12] The Minnesota rate at that time was six percent—now it is 7.3%. Some states, like Wisconsin[13] permit only a small portion of the federal tax to be deducted prior to the computation of the state tax. Minnesota permits a deduction only for federal taxes paid,[14] not those accrued. To suggest that taxes upon net income as now constituted are not a practical and real burden is not being realistic.

Furthermore, since 1918 there has occurred a significant change in the thinking of economic theorists as to the impact of a tax on net income. The traditional theory of economists

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[11]See *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S. Ct. 499 (1918).

[12]See Section 710 (a) (1) *Internal Revenue Code of 1939*, as amended by Sec. 202 (a) (B) of the 1943 Revenue Act.

[13]Section 71.04 (3) (a) *Wisconsin Statutes*—permits the deduction only to the extent of the federal taxes paid or ten percent of the income of the corporation whichever is smaller.

[14]See *Minn. Stat.* Sec. 290.09.

was that the burden of an income tax falls on the stockholders of the more profitable firms. This reasoning, which was the accepted theory until the 1930's, assumed that prices on commodities were determined by marginal producers who made no profit and who therefore paid no income tax. This theory came under serious scrutiny in the 1930's, and the more modern economic theory now recognizes that prices are established not by the marginal companies but by the so-called representative companies as to which an income tax is a definite cost of doing business. It is now recognized that taxable profits are made up of interest on capital, return for bearing risk on capital, and residual profit, and that at least as to the first two items the tax falls in part on the cost of doing business and increases these costs. Over the long run prices are affected in any given industry by the supply of initiative capital available to that industry, which in the long run will depend upon available return after taxes. See Anderson, *Taxation of the American Economy,* page 303 et seq.; Kimmel, *Taxes and Economic Incentives,* The Brookings Institution (1950), page 19.

Even a tax upon gross receipts as heretofore upheld[15] is much less burdensome than an income tax as levied by Minnesota since, under the rules carefully prescribed by this Court, such a tax cannot be imposed by more than one state on the same income. No such protection is assured taxpayers engaged in interstate commerce in those states imposing an income tax similar to that of Minnesota. A tax such as Minnesota seeks to impose can well be applied by a number of states and the aggregate of such taxes, together with the federal income tax, could easily exceed 100% of the tax-

[15] See *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938).

payer's net income so as to result in its complete confiscation.

One hardly need dwell on the situation that would exist were the cement plant and home office of this taxpayer located in Minnesota and 48% of its product shipped to Iowa and all of the balance, i.e., 52% to Wisconsin—both border states to Minnesota. Under the three-factor formula (i.e., including property, payroll and sales ratios), Minnesota has sought to use here, Minnesota would assert the right to a tax on more than 99 percent of the income—Iowa on more than 16 percent and Wisconsin on approximately 18 percent.

This Court has time and time again[16] invalidated taxes that were so designed that they might be imposed by more than one state on the same subject matter. As Justice Stone observed (at p. 255) in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938):

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce * * *."

It certainly is apparent that a tax upon net income, as applied by Minnesota, can be imposed by every state where that commerce touches. Had this taxpayer limited its sales to the State of Iowa no question of a cumulative burden could possibly have arisen. It would not then, as strictly local commerce, have been subjected to this additional bur-

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[16]See *Adams v. Storen*, 304 U.S. 307, 58 S. Ct. 913 (1938); *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 59 S. Ct. 325 (1939); *Case of the State Freight Tax*, 15 Wall 232, 21 L. Ed. 146 (1873); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

den which arises now solely because of the fact that it is engaged in interstate commerce. Clearly interstate commerce under this Minnesota law can be and is subjected to cumulative burdens. Taxes on net income derived solely from interstate commerce, if permitted in the manner applied by Minnesota can interfere with and place a burden on that commerce to which purely local commerce is not exposed.

The ever present danger of multiple taxation of income produced from interstate commerce is discussed by Altman and Keesling in their book entitled *Allocation of Income in State Taxation* (1950 Ed.) wherein they say (p. 14):

> "Again, a corporation doing business in several states may find that due to the use of different methods of apportionment, there will be attributed to the different states in which it does business an amount of income which in the aggregate exceeds its total income. * * *"
>
> "It is no exaggeration to say that the existing situation is serious in the extreme. It definitely requires attention and correction if state income tax laws are to be continued in effect. * * *"
>
> "* * * The present situation is sufficiently critical to require that active and positive steps be taken to prevent the possibility of the same income being subjected to tax in two or more states."

No one will argue with the right of a state to impose taxes measured by income if there are some local intrastate incidents or activities which will first constitute a valid basis or subject matter for the tax.[17] In such circumstances there is a jurisdictional compliance with due process requirements, and then local commerce as distinguished from interstate

[17] See, for example, *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, 298 U.S. 553, 56 S. Ct. 887 (1936); *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260 (1948); *International Harvester Co. v. Evatt*, 329 U.S. 416, 67 S. Ct. 444 (1947).

commerce, may properly become the subject upon which the tax may be imposed.

Certainly those engaged in interstate commerce must bear their just share of state taxes—or as one former member of this Court put it, "Even interstate commerce must pay its way."[18]

However, it is submitted that interstate commerce should not be subjected to multiple burdens, nor should it pay more than its share of state taxes. This Court has on many occasions charted a course of permissive state taxation without departing from the requirements of due process and without permitting the imposition of multiple or direct burdens upon purely interstate commerce. Thus there has been upheld as not violative of the Commerce Clause, any number of state taxes, the payment of which in the final analysis obviously came out of revenues produced from interstate commerce. There, however, the taxes themselves were not upon that very commerce itself as is and must be the case here.[19]

Accordingly this Court has approved franchise taxes upon the privilege of carrying on intrastate business even though measured by values attributable to interstate busi-

[18] Justice Clark in *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259, 39 S. Ct. 265 (1919). See also *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey*, 280 U.S. 338, 351, 50 S. Ct. 111 (1930); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938).

[19] This Court in every instance of permissive state taxation first required that there be a compliance with substantive due process not found in this case. There must be some "local incidents" not "an integral part of interstate commerce" as the Court here found the facts to be (Finding No. X, R. 194, f. 3). See *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S. Ct. 499 (1918); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938); *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 64 S. Ct. 1028 (1944). See also *Railway Express Agency Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951).

ness whether the taxpayer be a domestic[20] or foreign corporation.[21] Such taxes may even be measured by net income from business done within a foreign jurisdiction.[22] So too, property may be subjected to an ad valorem tax although completely devoted to interstate commerce use, as in the case of a railroad doing exclusively an interstate business.[23] Gross earnings may be used as a measure of that tax in lieu of a direct ad valorem tax.[24] Generally, however, the real questions in cases of that kind are ones involving due process and not the commerce clause.[25]

This Court has sustained flat sum license taxes if imposed upon the intrastate portions of the business[26] and also occupation taxes as on those engaging in the business of mining,[27] generation of power,[28] or production of natural gas,[29] even though the end product immediately went into interstate commerce.

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[20] *Kansas City M & B R.R. v. Stiles*, 242 U.S. 111, 37 S. Ct. 58 (1916).

[21] *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148, 57 S. Ct. 696 (1937); *Pullman Co. v. Adams*, 189 U.S. 420, 23 S. Ct. 494 (1903).

[22] *Matson Navigation Co. v. State Board of Equalization*, 297 U.S. 441, 56 S. Ct. 553 (1936).

[23] *Virginia v. Imperial Coal Sales Co.*, 293 U.S. 15, 55 S. Ct. 12 (1934).

[24] *Great Northern Railway Co. v. State of Minnesota*, 278 U.S. 503 49 S. Ct. 191 (1929); *Cudahy Packing Co. v. State of Minn.*, 246 U.S. 450, 38 S. Ct. 373 (1918).

[25] *Braniff Airways Inc. v. Nebraska, State Board of Equalization and Assessment*, 347 U.S. 590, 74 S. Ct. 757 (1954). See also *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158, 54 S. Ct. 152 (1933); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 11 S. Ct. 876 (1891).

[26] *Postal Telegraph-Cable Co. v. City of Fremont*, 255 U.S. 124, 41 S. Ct. 279 (1921).

[27] *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526 (1923).

[28] *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S. Ct. 548 (1932).

[29] *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639 (1927).

A properly apportioned gross receipts tax is not objectionable from the standpoint of the commerce clause[30] although obviously out-of-state values cannot be included as the subject of the tax.[31] In all such cases where the tax has been approved, intrastate transactions, separate from the interstate activity, served as the tax base. Taxes upon sales after the interstate commerce has ended unquestionably are valid[32] and in those situations where, because of interstate commerce clause restrictions or otherwise, a tax on sales cannot be imposed, a compensatory tax upon the use of the article in the buyers' state can be employed.[33]

It is obvious then that where local incidents, that is intrastate commerce exists, the state is not prohibited from imposing practically any kind of non-discriminatory tax. Under the doctrine of *Henneford v. Silas Mason Co.*, Minnesota here although it did not, unquestionably could have levied a compensatory use tax on the cement purchased by the Minnesota customers of this taxpayer. Had Minnesota imposed such a use tax at the usual three percent rate, it would have collected, even at the wholesale selling price, the sum of $496,047.00[34] for the years involved in this proceeding, as opposed to $67,213.45, which is the income tax sought here

[30] *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938).

[31] *Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 58 S. Ct. 913 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 59 S. Ct. 325 (1939).

[32] *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, 54 S. Ct. 575 (1934); c.f. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388 (1940).

[33] *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S. Ct. 524 (1937).

[34] These figures are computed by multiplying the total sales allocated to Minnesota by three percent. The sales are found in schedule M of Ex. A to P.

(exclusive of penalties and interest).[35]

It is readily apparent then that the decisions of this Court have not deprived Minnesota nor any other state of the right to make commerce, whether interstate or otherwise, pay its way. The fact that Minnesota, for policy reasons, apparently best known to itself, has not seen fit to enact a revenue producing measure within the framework of the permissible constitutional pattern cannot form the basis for any claim to validity of the tax sought to be imposed here. Sight should not be lost of the fact that this taxpayer pays all the taxes assessed against it by the State of Iowa. This is not a case of seeking immunity from taxation. However, it is submitted that Minnesota should not be permitted to levy an exaction upon an "* * * activity which is neither derived from the state, nor within its power to forbid,"[36]—namely interstate commerce.

It would appear then that a precedent of dangerous proportions would be created were taxes of the kind here imposed permitted to stand, whereas the sources of revenue of the various states would not be shut off, by continuing to hold such taxes invalid, for this Court has left most of the field to the states. The prohibitions of the Commerce Clause should not be circumscribed as Minnesota would do. As recently as 1954, this Court, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*,[37] reaffirmed the rule that (p. 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part

[35] Thirty-three states and the District of Columbia now impose a sales and use tax, in addition to many cities, typical of which is New York City.

[36] Judge Learned Hand in *Spector Motor Service, Inc. v. Walsh*, 139 F. 2d 809, 822 (C.C.A. 2d) (1943).

[37] 347 U.S. 157, 74 S. Ct. 396 (1954).

of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In characterizing the tax here, the trial court made the following observation:

"Obviously this tax is a tax upon the net income of a foreign corporation whose business is exclusively that of foreign commerce or interstate commerce or both." (R. 200, f. 1)

That court could hardly have stated otherwise for the provisions of the statute make no pretense of doing otherwise than imposing a net income tax directly upon interstate commerce whether there are local incidents or intrastate activities or not.

The commerce clause is not merely a matter of historic reference. It is a restraint upon state authority that is of vital significance to the flow of business throughout the states of this union. It was adopted with good reason, for as this Court pointed out in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327-331, 64 S. Ct. 1023, 1026 (1944);[38]

"The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

There being in Minnesota no local property, no domicile and no intrastate activities, it must necessarily follow that the only possible subject matter of the tax levy here is interstate commerce itself. That was the very thing considered in *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952), where it was held that a tax, the incidence of which fell upon soliciting inter-

[38] See also *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

state business in another state, was a tax on interstate commerce itself. There a truck was sent from neighboring Mississippi into Tennessee to pick up laundry and Tennessee sought to tax that activity.[39] In determining that the tax was invalid, this Court said (at p. 395):

> "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states."

One of the early leading cases decided in this field is *Cheney Bros. Co. v. Commonwealth of Massachusetts,* 246 U.S. 147, 38 S. Ct. 295 (1918). There the taxpayer was a Connecticut corporation engaged in the manufacturing and selling of silk fabrics. It maintained a selling office in Boston with one office salesman and four other salesmen who traveled throughout the New England states. The salesmen, like those employed in Minnesota by the appellant in the case at bar, solicited and took orders subject to approval by the home office in Connecticut and the corporation shipped goods directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. The Boston office retained copies and records of orders taken, but did no bookkeeping and made no collections. The corporation did no other business in the state. In holding that Massachusetts' imposition of taxes on this corporation's net worth was repugnant to the Commerce Clause, the following observation was made (p. 148):

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[39]As a matter of practice appellant's solicitors in Minnesota seldom took an order, for they generally were written up directly on the customers' purchase order form and sent into Mason City by the customer. Also in many cases they were telephoned or wired in (R. 127, 128). Even so, all such sales were included in estimating the volume of Minnesota sales (R. 33-41).

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. * * * *We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the Commerce Clause.*" (Emphasis supplied.)

Following the decision in the *Cheney* case, this Court was called upon to further consider the Massachusetts corporation excise and income tax in a factual situation almost identical to that involved in the instant case. In *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925), a New Jersey corporation engaged in the manufacturing and sale of cement, maintained an office in Boston, Massachusetts, under the charge and supervision of the district sales manager, where the corporation's correspondence and other customary sales activities in connection with the solicitation of orders were carried on. The office was used as a headquarters for traveling salesmen who solicited orders in Massachusetts and other New England states. As in the instant case, orders received by the taxpayer's Boston office were transmitted to the home office of the corporation to be accepted or rejected. All goods and invoices were sent directly to the customer. The corporation kept no sample or other merchandise in Massachusetts and its only property in that state was its office furniture and fixtures. Its salaries and office rent were paid from its home office. The corporation maintained no general bank account in Massachusetts

but it did keep an incidental account in Boston for the payment of minor expense items.

On the basis of these facts, it was held that the imposition on the taxpayer of the corporate excise and income tax involved was void as being in violation of and repugnant to the Commerce Clause of the United States Constitution. This Court stated at page 219:

> "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Bros. Co. v. Massachusetts, and cannot be enforced against a foreign corporation which does nothing but interstate business within the state. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden."

In *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951), this Court re-emphasized the controlling authority of its earlier decisions in *Cheney Bros. Co. v. Massachusetts*, supra, and *Alpha Portland Cement Co. v. Massachusetts*, supra, and established beyond any doubt that a state tax upon income produced exclusively from interstate commerce is void.

There the following principles were reaffirmed (pp. 609, 610):

> "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of

capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph V. Carter and Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair portion of the taxpayer's business done within the state, including both interstate and intrastate. * * *

* * * * * * * * * *

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law — McCulloch v. Maryland, supra."

In seeking to justify the validity of a tax imposed upon exclusively interstate commerce, the Minnesota Supreme Court relied upon certain language in some of the decisions of this Court during the interval between the *Cheney* and *Alpha Portland Cement* cases and the *Spector* case in 1951. More specifically such cases as *United States Glue Co. v. Oak Creek*;[40] *West Publishing Co. v. McColgan*,[41] *McGoldrick v. Berwind-White Coal Mining Co.*;[42] and *Memphis Natural Gas Co. v. Beeler*[43] were relied upon.

[40] 247 U.S. 321, 38 S. Ct. 499 (1918).
[41] 328 U.S. 823, 66 S. Ct. 1378 (1946).
[42] 309 U.S. 33, 60 S. Ct. 388 (1940).
[43] 315 U.S. 649, 62 S. Ct. 857 (1942).

Concededly this Court in the *Beeler* case did make the observation, solely as dictum, however, that a non-discriminatory tax by a state on the net income of a foreign corporation doing solely an interstate business is not prohibited. In any event, when *Spector* was decided this Court clarified its position (p. 609) as to language of *Beeler* by stating:

> "The decision in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

In *United States Glue Co. v. Oak Creek*, supra, as in the railroad cases, the taxing state accorded to the taxpayer certain privileges, over and above those growing out of the federal right to trade in interstate commerce. Wisconsin was the state of incorporation of the glue company and as such gave it its very existence including the corporate powers and privileges concomitant therewith. For that Wisconsin was entitled to its exaction. In addition to being a creature of the taxing state, the taxpayer had manufacturing plants, distribution centers and various other intrastate activities in Wisconsin, any one of which validly could be subjected to and thereby constitute the base upon which to sustain the tax there in issue. It was the same as if Iowa had imposed an income tax on this taxpayer. Comment has heretofore been made as to the inapplicability of the *West Publishing Company* case in footnote 5.

If each state be free to establish its own barriers to interstate commerce by the simple expedient of imposing its own tax, at its own special rate, and under its own formula, chaos necessarily must result and there can be no area of "free trade among the several states", a principle so jealously guarded by this Court, as well it must be, under the Constitution of the United States.

The result of sustaining the position taken by the State of Minnesota would void the interstate commerce clause. The legislatures of every state could and undoubtedly would emulate Minnesota by imposing their own measure of income tax upon all interstate business within their states regardless of whether any separate local or intrastate activity exists.[44]

This could be accomplished under the theory of this Minnesota decision merely by labeling the proposed tax a "net income" tax and, with this magic key, the hitherto forbidden door to state taxation of exclusively interstate trade and commerce would open wide. The serious and chaotic consequences of such taxation must be obvious.

The issues involved in this case are becoming of ever increasing importance today and there appears to be mounting pressure and an inclination among several of the states' highest courts to whittle away at the exclusive federal jurisdiction over interstate commerce. Louisiana,[45] and now Minnesota, have followed this trend. However, the highest courts

[44] Typical of the type of legislation that might be enacted, is a proposal to be submitted at the November 4, 1958 general election in California which would levy a tax of 46 percent on incomes over $50,000. This, together with a present 52 percent Federal rate, would result in complete confiscation, especially if more than one state taxed the same income.

[45] *Fontenot v. John I. Hay Co.*, 228 La. 1031, 84 So. 2d 810 (1955).

of Pennsylvania[46] and Georgia[47] have firmly adhered to the principles established by this Court in its interpretations of the Commerce Clause.

As a result of the conflict in these decisions, there has been much speculation about whether the mere denomination of a state tax as a "net income" or "an annual" tax (as here) rather than a "privilege" or "excise" tax which is measured by the net income will insure the validity of such tax even though its imposition is admittedly upon exclusively interstate commerce business.

It would seem unreasonable to suppose that merely changing the name of a tax would transform it from one that is invalid in its application to interstate commerce to one that is valid where no real difference exists between them other than the difference in their labels.

These so-called "different" taxes are identical in both their impact and effect. The measure of the tax and the amount sought to be collected are the same under each. The burden imposed by one is no less than that imposed by the other. In fact, only a semantic distinction exists between the two types of taxes, for in substantive operation, there is none. As stated by Justice Rutledge (at p. 666) in *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 69 S. Ct. 1264 (1949):

> "* * * we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels."

See also *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 331, 64 S. Ct. 1023 (1944).

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[46] *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100 (1956).

[47] *Stockham Valves and Fitting, Inc. v. T. V. Williams, as State Revenue Commissioner of the State of Georgia*, Supreme Court of Georgia, Docket No. 19838. Cert. granted March 17, 1958—Docket No. 763.

This same philosophy was expressed by Justice Black as recently as March 3 of this year in *City of Detroit v. The Murray Corporation*, —— U.S. ——, Docket No. 18 (1958), wherein he said:

> "However in passing on the constitutionality of a state tax 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' Lawrence v. State Tax Commission, 286 U.S. 276, 280. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down."

Affirmative Congressional action can solve this problem if need be, as has been suggested by some members of this Court.[48] Such legislation has been found feasible in the fields of unemployment compensation,[49] state regulation of insurance business,[50] and in the exclusion of oleomargarine[51] and prison-made goods[52] from federal regulations. The Miller-Tydings Act[53] permits fair trade price agreement as an exception to the Sherman Act in states having fair trade laws, and other acts allow concurrent state regulation of securities.[54]

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[48] Justices Black, Frankfurter and Douglas dissenting in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189, 60 S. Ct. 504 (1940). See the same effect, *Barrett, Substance v. Form in the Applications of the Commerce Clause*, 101 Pa. L.R. 740, 749 (1953); *Hartman, State Taxation of Interstate Commerce*, 275-285 (1953).

[49] *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945).

[50] *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142 (1946), 15 U.S.C. Section 1012.

[51] Title 21 U.S.C. 25.

[52] Title 49 U.S.C. 60.

[53] Title 15 U.S.C. 1.

[54] Title 15 U.S.C. 77.

However, until such Congressional action is had, it would seem fairly obvious that the approach so far adopted by this Court has served well, for it has made possible an area of free trade among the states that has produced the highest standard of living in the world. To permit unfettered state taxation of this commerce hardly would be conducive to its continued growth.

To urge merely because of labels that a tax upon net income is any different from an excise upon net income—both of which produce identically the same tax, is to ignore realities and in the words of this Court in *Robbins v. Taxing District of Shelby County, Tennessee,* 120 U.S. 489, 7 S. Ct. 592 (1887):

> "* * * is to speak unadvisedly, and without due attention to the truth of things."

The fact that solicitation of interstate business, without more, affords no basis for jurisdiction to tax has been firmly established in the cases and has been relied upon for many years in business planning and organization. To upset this rule now would create untold confusion and uncertainty. It would make a farce of our federal protective covering and hazard the very economic existence of hundreds, if not thousands, of business organizations in the country, with harmful effects on the country's economy. In this very case, Minnesota itself apparently was of the view the tax could not validly be imposed here, for it waited for almost 20 years after the enactment of its own tax statute before even attempting to levy the tax in this case.

It would be difficult to formulate a more acceptable rule than the rule that, mere solicitation is (as the trial court here found), an integral part of interstate commence itself, and therefore does not afford a basis for imposition of a tax.

To make such jurisdiction dependent upon the extent of or the manner or the system, duration or intensity of solicitation, would completely eliminate any criteria upon which business or industry could rely. The workable rule and the rule guaranteed by the Constitution of the United States is that so long as the company confines its activities to the solicitation of interstate sales it cannot be subjected to the jurisdiction of the state to tax for to so permit it would be nothing more or less than a direct tax upon interstate commerce itself.

It has been suggested that Minnesota furnishes a civilized community within the United States to carry on this interstate commerce and therefore is entitled to a tax. That, of course, is the same historical argument that was advanced in favor of permitting the states to levy impost duties, and protective tariffs. "The net effect would be substantially to resurrect the custom barriers which the Commerce Clause was designed to eliminate."[55]

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Minnesota should be reversed.

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August, 1958

[55] *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954).

APPENDIX A

When first adopted in 1933, the pertinent provisions of the statute which is now referred to as *Minnesota Statutes*, §290.03, read as follows:

> "Sec. 3. Rate of tax—(a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in sub-section (b) hereof, computed in the manner and at the rates hereinafter provided.
>
> "(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporation; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year." *Laws, 1933, c. 405.*

The said statute was amended in 1937, to read as follows:

> "Sec. 3. Rate of tax.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> "(a) Domestic and foreign corporations whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;" *Laws, 1937, Ex. Sess. C. 49.*

The statute was amended in 1941, to read as follows:

"2394-3. Classes of taxpayers.—An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both." *Laws 1941, C. 550.*

An additional minor change was made in the said statute in 1945, so that it then read as follows, and now appears as Section 290.03 Minnesota Statutes:

"290.03. Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;" *Laws 1945, C. 410.*

The statute as re-enacted in 1945, is the statute in its present form.

The statute as originally adopted is found in *Minnesota Laws, 1933*, chapter 405, page 690.

The statute as first re-enacted is found in *Minnesota Laws, 1937*, Ex. Sess. c. 49, page 61.

The statute as re-enacted and amended in 1941 is found in *Minnesota Laws, 1941,* chapter 550, page 1153.

The statute as re-enacted and amended in 1945 is found in *Minnesota Laws, 1945,* chapter 410, page 787.

As appears from its certificate, the Supreme Court of Minnesota certified that the constitutionality of each enactment was called in question in the court below (R. 303).

APPENDIX B

Sec. 290.19. * * * 1. The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deductions of the kind permitted by section 290.09 so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

(1) If the business consists of the manufacture in Minnesota or within and without Minnesota of personal property and the sale of said property within and without the state, the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(a) The percentage which the sales made within this state and through from or by offices, agencies, branches or stores within this state is of the total sales wherever made:

(b) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and,

(c) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(d) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentages: 70 per cent of the percentage determined under clause (1) (a), 15 per cent of the percentage determined under clause (1) (b), and 15 per cent of the percentage determined under clause (1) (c);

* * * [Sec. 290.19, R. S.]

Regulations of the Commissioner of Taxation

Art. 19-1. *Net Income to Be Apportioned.*—The formulae prescribed by the provisions of this section shall be applied to the apportionable net income of a trade or business where the business carried on within this State is an integral part of a business carried on both within and without this State.

Art. 19-2. *Apportionment of Net Income Under Section 290.19, Subd. 1(1).*—If the business consists of the manufacture in Minnesota or within or without Minnesota of personal property and the sale of said property within and without Minnesota, the formula shall be as follows:

Under Section 290.19, Subd. 1 (1) (a) (b) (c)

$$\frac{\text{Minn. Sales}}{\text{Total Sales}} + \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + \frac{\text{Minn. Tangle Prop.}}{\text{Total Tangible Prop.}} \div 3 = \% \text{ to Minn.}$$

Using hypothetical percentages we secure a percent to Minnesota thus:

	Within Minn.	Without Minn.	Total Percent
Sales	40%	60%	100%
Payroll	50%	50%	100%
Tangible Property..	70%	30%	100%
Divide by Three. . . .3/160%			
Percent to Minnesota 53 1/3%			

In the alternative the following formula may be employed if a lesser percentage to Minnesota results by its use:

$$70\% \text{ of } \frac{\text{Minn. Sales}}{\text{Total Sales}} + 15\% \text{ of } \frac{\text{Minn. Payroll}}{\text{Total Payroll}} + 15\% \text{ of } \frac{\text{Minn. Tang. Prop.}}{\text{Total Tang. Prop.}} = \% \text{ to Minn.}$$

SUPREME COURT, U.S.

FILED
DEC 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 606

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Respondent in the above entitled cause moves the Court, pursuant to Rule 16, paragraph 1,(b) and (c), of the Revised Rules of this Court, to dismiss this appeal or to affirm the judgment below for the following reasons: There is no substantial Federal question presented as a basis of

jurisdiction in this Court because the questions presented have been foreclosed by previous decisions of this Court.

Wherefore, the respondent moves the Court to dismiss the appeal in this cause for want of a substantial Federal question or in the alternative to affirm the judgment of the Supreme Court of Minnesota from which this appeal was taken for the reason that the questions presented are foreclosed by prior decisions of this Court.

ARGUMENT IN SUPPORT OF MOTION, STATEMENT OF THE CASE INCLUDING THE FACTS

This case involves the Minnesota corporate income tax act (Laws of Minnesota 1933, Chapter 405, Section 3, coded as Minnesota Statutes, Section 290.03) which imposes a tax upon the net income of corporations derived from sources within the State of Minnesota. The provisions of Section 290.03 are set forth in Appendix A.

In that part of its jurisdictional statement entitled, "Statement of Facts", (pages 4-7) the appellant sets forth some of the facts concerning the case. The appellant's statement, however, is interspersed with its own characterizations, interpretations, and conclusions which are not supported by the record in an effort to minimize appellant's activities in Minnesota and to supply a substantial basis essential to sustain jurisdiction.

A complete statement of the facts is set forth in the trial court's findings of fact (Statement, pp. 95-103; 113-115)[1]

[1]Inasmuch as the Trial Court's findings and the Minnesota Supreme Court opinion (reported as —— Minn. ——, 84 N.W. 2d 373 (1957)) are contained in the appellant's Jurisdictional Statement, all references will be made to the Jurisdictional Statement.

and the Minnesota Supreme Court opinion (Statement, pp. 34-35).

Some of the important facts showing the appellant's activities in Minnesota might be summarized as follows:

For the convenience of its salesmen and customers, the appellant rented and maintained in Minnesota an office which was used to some extent as a central office and served as a clearing house for orders and complaints (Minn. Supreme Crt. opinion; Statement, p. 34). The office was available to out-state salesmen while in Minneapolis and was a place where they could telephone and work (Amended Finding of Fact IX of Trial Crt.; Statement, p. 114). A full-time secretary was employed in this office (Minn. Supreme Crt. opinion; Statement, p. 34). Two telephone lines were maintained and were listed in both telephone (alphabetical and classified indexes) and city directories (Minn. Supreme Crt. opinion; Statement, p. 34). One of the district representatives was in charge of this office and, with the appellant's knowledge, held himself out as district manager (Amended Finding of Fact VIII of Trial Crt.; Statement, p. 113). He was listed in the telephone book and city directory as district manager and applications for automobile licenses were signed as district manager (Amended Finding of Fact VIII of Trial Crt.; Statement, pp. 113-114). On occasion appellant's employees purchased automobiles in Minnesota two of which were signed for by this district manager (Amended Finding of Fact VIII of Trial Crt.; Statement, p. 114). Appellant owned personal property in this state consisting of automobiles driven by salesmen, furniture and fixtures, supplies, goodwill advertising, and other material located in its Minneapolis office (Finding of Fact V of Trial Crt.; Statement, pp. 97-98).

During the years at issue the appellant had at most six employees in the State of Minnesota (Finding of Fact VI of Trial Crt.; Statement, p. 98). Two salesmen and a secretary were the employees of the appellant operating out of its Minneapolis office (Finding of Fact VI of Trial Crt.; Statement, p. 98). The other employees operated directly out of their homes (Finding of Fact VI of Trial Crt.; Statement, p. 98). All were residents of Minnesota (Finding of Fact VI of Trial Crt.; Statement, p. 98). Most of the supplies used in Minnesota by the appellant were obtained from the Mason City office (Finding of Fact VII of Trial Crt.; Statement, p. 98). However, the appellant's employees in the Minneapolis office did have authority to purchase supplies such as stamps, etc. (Finding of Fact VII of Trial Crt.; Statement, p. 98).

The price of appellant's cement products was the delivered price to the customer, the sum of the base price plus the freight plus the package. Accordingly, the products were invoiced f.o.b. destination. Freight was prepaid by the appellant, and in no case could the customer purchase cement from appellant except at a delivered price nor, since appellant had no facilities for loading trucks, could the customer pick up cement at appellant's plant. Quotations giving both base and delivered price were sent directly to the customer from the Mason City office. Although the salesmen had no authority to give the customer a quotation, they did carry a rate book from which they regularly computed the delivered price to the customer (Minn. Supreme Crt. opinion; Statement, p. 35).

Claims for loss or damage were generally handled through the home office. But it was not uncommon for customers to present their claims to the salesman who wrote the company

informing it of the trouble and requested the company what they wished to do about it. (Amended Finding of Fact X of Trial Crt.; Statement, p. 115).

The appellant was engaged in selling and delivering cement to Minnesota customers for at least thirty years prior to the commencement of the action here involved (Finding of Fact XI of Trial Crt.; Statement, pp. 100-101). Forty-eight per cent of appellant's entire sales were made to customers within the State of Minnesota (Finding of Fact XI of Trial Crt.; Statement, p. 101). By reason of the appellant's location, it enjoyed a definite competitive advantage over Minnesota cement companies because of the favorable freight rates to the appellant by reason of the fact that it was in closer proximity to southern Minnesota customers than such customers were to Minnesota cement producers (Finding of Fact XII of Trial Crt.; Statement, p. 101).

The appellant would sell only to eligible dealers which are lumber and building supply dealers, contractors and ready-mix contractors (Amended Finding of Fact IX of Trial Crt.; Statement, p. 102). The salesmen regularly and systematically solicited orders from these eligible purchasers (Minn. Supreme Crt. opinion; Statement, p. 34). In addition the salesmen regularly and systematically contacted potential customers and users of cement products (including architects and building and road contractors) to induce them to buy from appellant's established local outlets and dealers, promoted goodwill and furnished advertising materials to customers, entertained customers and occasionally received and forwarded complaints (Minn. Supreme Crt. opinion; Statement, p. 34).

The appellant's predecessor corporation has resorted to the courts of the State of Minnesota to enforce its contracts

on at least one occasion (Finding of Fact XVI of Trial Crt.; Statement, p. 103).

Appellant's assignment of error in effect raises the two questions of (1) whether there has been a violation of the commerce clause of the Federal Constitution and (2) whether there has been a violation of the due process clause of the Federal Constitution. The questions presented by appellant, we believe, have been foreclosed by prior decisions of this Court and, therefore, are not substantial.

Appellant's contentions concerning alleged violations of the commerce clause have been foreclosed by prior decisions of this Court.

The Minnesota law here at issue, Minnesota Statutes, Section 290.03, imposes a tax upon the taxable net income of all domestic and foreign corporations, except those taxable under Minnesota Statutes, Section 290.02, which own property within Minnesota, or whose business consists exclusively of foreign commerce, interstate commerce, or both.

The Minnesota Supreme Court has held that this tax is a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against interstate commerce (Statement, p. 39); it is not, by dictionary definition, legislative intent, or by operative effect, an excise, franchise, or privilege tax (Statement, p. 39). It is non-discriminatory, applying equally to all taxpayers, resident or non-resident, whether engaged in interstate or intrastate commerce, and is confined to that portion of a taxpayer's income earned from business activities which are fairly apportioned to, and localized within, the State of Minnesota (Statement, p. 41).

The interpretation of this statute by the Minnesota Supreme Court is a part of the statute for purposes of determining whether taxing statutes, as applied, violate the commerce clause of the United States Constitution. *Wheeling Steel Corporation v. Glander,* 337 U.S. 562, 570, 69 S. Ct. 1291, 1296 (1949).

This Court has consistently held that interstate commerce must pay its own way. *Postal Telegraph Cable Co. v. City of Richmond,* 249 U.S. 252, 259, 39 S. Ct. 265, 266 (1919); *Western Livestock v. Bureau of Internal Revenue,* 303 U.S. 250, 254, 58 S. Ct. 546, 548 (1938); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 165, 74 S. Ct. 396, 400 (1954).

It is also a well-established and long-standing principle of law that a tax does not discriminate against interstate commerce if other related taxes impose equal burdens on intrastate commerce (*Interstate Busses Corp. v. Blodgett,* 276 U.S. 245, 251, 48 S. Ct. 230, 231 (1928); *Gregg Dyeing Co. v. Query,* 286 U.S. 472, 479, 52 S. Ct. 631, 634 (1932); *Henneford v. Silas Mason Co.,* 300 U.S. 577, 582-584, 57 S. Ct. 524, 527 (1937); *Western Livestock v. Bureau of Internal Revenue,* 303 U.S. 250, 258, 58 S. Ct. 546, 549-550 (1938); *Southern Pacific Co. v. Gallagher,* 306 U.S. 167-172, 59 S. Ct. 389, 391 (1939); *Nippert v. City of Richmond,* 327 U.S. 416, 425-426, 66 S. Ct. 586, 590-591 (1946)).

The tax at issue does not discriminate against interstate commerce, since all corporations not taxable under Section 290.03 are subject to tax of equal rate under Section 290.02, the provisions of which are set forth in Appendix B.

In fact, if the appellant was not subject to tax in Minnesota, it would enjoy an advantageous competitive position with domestic corporations who are subject to a tax of equal rate.

The appellant in asserting the invalidity of the statute at issue places great emphasis on the following four cases: *Cheney Bros. Co. v. Commonwealth of Massachusetts*, 246 U.S. 147, 38 S. Ct. 295 (1918); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925); *Spector Motor Service Co. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, supra. An analysis of these cases and the other cases in which taxing provisions have been held to violate the commerce clause will show that, in each case, the tax was either an excise tax on interstate commerce or a tax upon the franchise or occupation or privilege of engaging in interstate commerce. In the Cheney Bros. Co.[2] and Alpha Portland Cement Co. cases the Massachusetts tax was construed by the Massachusetts Supreme Court as an excise tax on interstate business; in the Spector case the Connecticut Supreme Court determined that the tax was upon the privilege of engaging in interstate commerce and in the Michigan-Wisconsin Pipe Line Co. case the Michigan Supreme Court held that the tax was upon the occupation of transmission in interstate commerce.

In the Spector case, supra (pages 608-609), in holding invalid a franchise tax of a foreign corporation engaged exclusively in interstate commerce, this Court stated:

> "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91 L. Ed. 265; McLeod v.

[2] It should be noted that *Cheney Bros. Co. v. Mass.*, 246 U.S. 147, 38 S. Ct. 295 (1918), involves an excise tax imposed on seven corporations differently situated. The tax was held to be valid as applied to the Northwestern Consolidated Milling Co., which had comparable localized activities as did the appellant.

J. E. Dilworth Co., 322 U.S. 327, 64 S. Ct. 1023, 88 L. E. 1304.

" * * * * * * * * *

"The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

In addition to the above cases, this Court has, on a number of other occasions, drawn a well-defined distinction between an excise or privilege tax imposed on the exercise of a constitutional privilege as distinguished from a tax on property used in, or income received from, such activities. There has always been a clear recognition that in addition to excise or privilege taxes there are the categories of taxes on property and taxes on income.

This Court on a number of occasions has observed that one type of tax would be unconstitutional and another would not in a particular factual situation.[3] Thus in the case of

[3]Compare *Anglo Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 53 S. Ct. 373 (1933), with *Peck & Co. v. Lowe*, 247 U.S. 165, 38 S. Ct. 432 (1918); *New Jersey Realty Title Ins. Co. v. Div. of Tax Appeals*, 338 U.S. 665, 70 S. Ct. 413 (1950), with *Werner Machine Co. v. Director of Div. of Taxation*, 350 U.S. 492, 76 S. Ct. 534 (1956); *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023 (1944), with *General Trading Co. v. State Tax Commission*, 322 U.S. 335, 64 S. Ct. 1028 (1944).

Murdock v. Pennsylvania, 319 U.S. 105, 113, 63 S. Ct. 870, 875 (1943), the court declared:

> "* * * * * A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U.S. 33, 56-58, 60 S. Ct. 388, 397, 398, 84 L. Ed. 565, 128 A.L.R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id. 309, U.S. at page 47, 60 S. Ct. at page 392, 84 L. Ed. 565, 128 A.L.R. 876 and cases cited."

The Minnesota net income tax at issue in this proceeding is not an excise on commerce, nor is it imposed on the privilege or franchise of engaging in interstate commerce. It is levied after the interstate commerce transactions within the state have been completed, and after all expenses are paid and losses adjusted. Thus the tax is exacted only after the stream of income producing interstate commerce has ceased to flow (Minn. Supreme Crt. opinion; Statement, p. 44).

The fact that a net income tax does not impede commerce is recognized by this Court in *Henneford v. Silas Mason*, 300 U.S. 577, 586, 57 S. Ct. 524, 528 (1937), where the court stated:

> "But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business."

This court has on several previous occasions considered and sustained a tax on net income from interstate commerce of the same type of tax which is at issue in this proceeding. *U. S. Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 38 S. Ct.

499 (1918); *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920).

In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 47, 60 S. Ct. 388, 392 (1940), this court in discussing a tax on net income of a foreign corporation derived exclusively from interstate commerce stated:

> "* * * A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited."

Several years later, in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 656, 62 S. Ct. 857, 862 (1942), this court reaffirmed the principle that a state may impose a tax on net income wholly derived from interstate commerce.

Subsequently the power of a state to impose a tax on net income derived exclusively from interstate commerce was regarded as so well settled that, in 1945 in the case of *Memphis Natural Gas Co. v. State Tax Commission*, 323 U.S. 682, 65 S. Ct. 440, this court dismissed the appeal for want of a substantial Federal question, and again in 1946, this court unanimously affirmed, in a per curiam decision, the holding of the California Supreme Court that their net income tax on income derived exclusively from interstate commerce did not violate the commerce clause. (*West Publishing Co. v. McColgan*, 328 U.S. 823, 66 S. Ct. 1378).

Appellant's contentions concerning alleged violations of the due process clause have been foreclosed by prior decisions of this Court.

In considering whether a particular tax is to stand or fall under the due process clause, the question for determination is whether the tax as imposed taxes values beyond the jurisdiction of the state imposing the tax. As stated in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174, 69 S. Ct. 432, 434 (1949):

> "* * * So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S. Ct. 246, 249, 85 L. Ed. 267, 130 A.L.R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state."

Apportionment formulae similar to the three-factor apportionment formula used by the State of Minnesota have on many occasions been upheld against due process attacks. *International Harvester Co. v. Evatt*, 329 U.S. 416, 67 S. Ct. 444 (1947); *Butler Brothers v. McColgan*, 315 U.S. 501, 506-7, 62 S. Ct. 701 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 60 S. Ct. 273 (1939).

The cases cited herein demonstrate that if the total income of a taxpayer is apportioned so as to reflect only that portion of the income properly assignable to the taxing state, then insofar as due process is concerned the tax thereon is not unconstitutional; for the very essence of the due process objection is that the tax as applied taxes income and values beyond the territorial jurisdiction of the state.

To sustain a tax under the due process clause there must, of course, be some minimal connections between the taxed commerce and the state.

The appellant's contention that there are insufficient connections with the state to be subject to its taxing power is foreclosed by the decision of this court in the case of *International Shoe Company v. State of Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945), in which the court held that the appellant who was a non-domiciled foreign corporation engaged exclusively in interstate commerce and whose only connections with the State of Washington consisted of continuous and systematic course of solicitation plus the fact it had resorted to Washington's courts were sufficient to subject appellant to jurisdiction and to the tax.

In the findings of fact (Statement, pp. 95-103; 113-115) and the factual review (Statement, pp. 34-35), the income producing activities of the appellant in the State of Minnesota were outlined. The Supreme Court of Minnesota, in its opinion, has also outlined some of the benefits and protection which the appellant has received in relation to its activities in Minnesota. The factual connections between the appellant and the state were far greater in the instant case than in the International Shoe Company case. The holding in the International Shoe Company case that the activity of employing salesmen in a state is a sufficient due process foundation for the imposition of a tax forecloses the appellant's objections, based on due process, to the imposition of a tax on net income arising from that activity and other activities within the taxing state.

In 1946, in West Publishing Co. v. McColgan, supra, on facts substantially similar to the facts in the instant case, this court citing International Shoe Co., supra, as authority,

affirmed in a per curiam decision the decision of the California Supreme Court that the imposition of California's income tax on the net income of a corporation engaged exclusively in interstate commerce did not violate the due process clause.

Summary of Controlling Cases

In 1946 this court was confronted with both a commerce clause and due process attack upon California's net income tax imposed on a corporation engaged exclusively in interstate commerce. *West Publishing Co. v. McColgan,* supra.

The activities of West Publishing Company in California were substantially similar to the appellant's activities in Minnesota.

The California Supreme Court, speaking through Judge Traynor, 27 Cal. 2d 705, 166 P. 2d 861, noted the distinction between the line of cases (Alpha Portland Cement Co. v. Mass., supra; Cheney Bros. Co. v. Mass., supra, etc.) invalidating taxes upon the privilege of doing an exclusively interstate business, and those cases approving a tax on the net income derived from interstate commerce (McGoldrick v. Berwind-White, supra, Memphis Natural Gas Co. v. Stone, supra, etc.) held that California's tax on net income from a corporation engaged in interstate commerce did not violate the commerce clause. It also held that the imposition of this net income tax did not violate the due process clause. The power of a state to impose a net income tax on corporations similarly situated was, by this time, so well established, that this court on review unanimously affirmed the California Supreme Court in a per curiam decision, citing as authority the cases of U. S. Glue Co. v. Town of Oak Creek, supra,

Interstate Busses Corp. v. Blodgett, supra, Memphis Natural Gas Co. v. Beeler, supra, and International Shoe Co. v. Washington, supra.

We submit that these cases are dispositive of the issues presented in this proceeding.

CONCLUSION

Inasmuch as appellant's contentions concerning alleged violation of the commerce clause and due process clause have been foreclosed by prior decisions of this Court, we respectfully submit that this appeal should be dismissed or in the alternative that the judgment of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

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APPENDIX A

Minnesota Statutes, Section 290.03, as enacted in 1933 (Minnesota Laws 1933, Chapter 405, section 3) provides:

"Rate of tax — (a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in subsection (b) hereof, computed in the manner and at the rates hereinafter provided.

(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within the state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year."

By Minnesota Laws 1937, Extra Session, Chapter 49, Section 3, the above statute was amended to read as follows:

"Rate of tax. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(a) Domestic and foreign corporations whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income

from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

(c) Estates of decedents dying domiciled within or without this state; and

(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

In 1941 (Minnesota Laws 1941, Chapter 550, section 1) this statute was again amended to read:

"Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.

(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year.

(c) Estates of decedents, dying domiciled within or without this state, and,

(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

The last change was made in 1945 (Minnesota Laws 1945, Chapter 410, section 1) when this section was amended to read:

"Classes of taxpayers. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

(3) Estates of decedents, dying domiciled within or without this state; and,

(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

APPENDIX B

Minnesota Statutes, Section 290.02, as enacted in 1933 (Minnesota Laws 1933, Chapter 405, section 3) provides:

> "Income tax imposed. There is hereby imposed on every domestic and foreign corporation an annual tax for the privilege of existing as a corporation or of transacting any local business within this state during any part of its taxable year, measured by its taxable net income for such year, computed in the manner and at the rates hereinafter provided."

In 1937 (Minnesota Laws 1937, Extra Session, Chapter 49, section 2), the above statute was amended to read:

> "Income tax imposed. — (a) An annual tax is hereby imposed upon every domestic corporation, except those included within Section 3, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within Section 3, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.
>
> (b) The tax imposed by subsection (a) shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and shall be computed in the manner and at the rates hereinafter provided."

The last change was made in 1947 (Minnesota Laws 1947, Chapter 635, section 2):

> "Imposition of privilege tax on corporations; measurement. An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every

foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

"The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter."

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
SEP 12 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE RESPONDENT

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IN THE

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No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the State Supreme Court in this action is reported in 250 Minn. 32, 84 N. W. 2d 373. For a copy of that opinion, the dissenting opinions and judgment, see R. pp. 221, et seq. For copies of the trial court's findings of fact, conclusions of law, and order for judgment dated August 31, 1955, and memorandum attached thereto; order for

amended findings of fact, conclusions of law and order for judgment, dated October 11, 1955; and judgment dated November 4, 1955, see R. pp. 189, et seq.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 10, 1957 (R. 297, f. 3; R. 298, f. 1) following the decision of that court sustaining the validity of the tax in question. A timely petition for re-argument was filed by appellant on July 25, 1957 (R. 276, f. 280) and was denied by the Minnesota Supreme Court on August 28, 1957 (R. 297, f. 297). Notice of appeal was filed by appellant in the Supreme Court of Minnesota on September 12, 1957 (R. 298, f. 299).

Jurisdiction of the court is invoked under 28 U. S. Code, 1257 (2) and 2101 (c) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court violates the due process clause of the U. S. Const. Amend. XIV, s. 1 and commerce clause, U. S. Const. Art. I, s. 8, cl. 3.

Probable jurisdiction was noted January 6, 1958 (R. 304, f. 309).

QUESTIONS PRESENTED

I

Whether a net income tax applying equally to all taxpayers, resident or non-resident, whether engaged in either interstate or intrastate commerce, confined to that portion of the taxpayer's net income earned from and fairly apportioned to business activities localized within the taxing state,

is in conflict with and thus invalid and void under the due process clause of U. S. Const. Amend. XIV, s. 1.

II

Whether a net income tax applying equally to all taxpayers, resident or non-resident, whether engaged in either interstate or intrastate commerce, confined to that portion of the taxpayer's net income earned and fairly apportioned to business activities localized within the taxing state in the case of a foreign corporation whose business in the taxing state consists exclusively of interstate commerce is in conflict with and thus invalid and void under the commerce clause of the U. S. Const. Art. I, s. 8, cl. 3.

STATUTE INVOLVED

The tax in question was levied under Minnesota Statutes, s. 290.03. The statutory history of this section is set forth and attached hereto as Appendix "A". The statute reads as follows:

"290.03. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation pur-

poses by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for for than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

STATEMENT OF CASE

During the years here involved, appellant was a corporation organized and existing under and by virtue of the laws of the State of Iowa, with principal offices and place of business in Mason City, Iowa (R. 189, f. 1).

It was engaged in the manufacture and sale of cement, its home office and manufacturing plant being located in Mason City, Iowa (R. 191, f. 1). It maintained a sales office in Minneapolis, Minnesota, which was operated under a lease paid for from the appellant's home office in Mason City, Iowa (R. 191, f. 1). Appellant owned no real estate in Minnesota but did own personal property in this state consisting of office furniture and fixtures, supplies, good will advertising and other material located in its Minneapolis sales office (R. 191, ff. 1-2). The office consisted of three rooms and the personal property included three desks, two filing cabinets, a typewriter and some chairs (R. 191, f. 2). In addition, the automobiles used by the appellant's salesmen were owned by the company and were located in the State of Minnesota (R. 191, f. 2).

Appellant had, at most, no more than six employees residing in the State of Minnesota (R. 191, f. 3). Two salesmen and a secretary operated out of its Minneapolis sales office (R. 191, f. 3). Other employees of the appellant in this state operated directly out of their homes (R. 191, f. 3). All were residents of Minnesota (R. 191, f. 3). These employees were hired by supervisory personnel from the appellant's home office in Mason City, Iowa (R. 191, f. 3).

The personal property of appellant located in the State of Minnesota during the years here involved was paid for out of appellant's home office in Mason City, Iowa (R. 192, f. 1). Most of the supplies used in Minnesota by the appellant were obtained from the Mason City office (R. 192, f. 1). Appellant's employees in the Minneapolis office, however, had authority to purchase supplies, such as stamps, etc. (R. 192, f. 2). Appellant did not maintain a bank account or a petty cash fund in this state (R. 192, f. 2). Salaries of Minnesota employees were fixed by the Mason City office and both salaries and entertainment expense were paid directly to the salesmen from appellant's home office in Iowa (R. 192, ff. 2-3). Appellant's employees were on a straight salary and vacation policies were established by the home office (R. 192, f. 3). Territories of appellant's salesmen in Minnesota were allocated by the home office and Minnesota employees did not have authority to re-allocate territories among themselves (R. 192, f. 3).

Appellant maintained two telephone lines in its Minneapolis office and was listed in the alphabetical and classified section of the Minneapolis telephone directory (R. 192, f. 3; R. 193, f. 1), and in the Saint Paul telephone directory since prior to 1946 (R. 178, f. 1). Appellant was listed in the classified section under the subheading: "Cement, Whole-

salers and Manufacturers" (R. 176, f. 3; R. 179, f. 1). The telephone company determines the subheading or classification under which a subscriber is listed by consulting the company obtaining the service (R. 177, ff. 1-2).

Appellant was also listed in the Minneapolis city directory (R. 193, f. 1).

Appellant's employee, Wilkins, held himself out as appellant's district manager and the company had knowledge of this fact (R. 215, f. 1). Wilkins was in charge of the Minneapolis sales office (R. 215, f. 2). He was listed in the telephone directory and in the city directory as district manager and applications for automobile license plates were signed by him as appellant's district manager (R. 215, f. 2). On various occasions, appellant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles (R. 215, f. 2). Such purchases were on bids approved by the home office (R. 215, f. 2).

The Minneapolis sales office of the appellant was used to some extent as a central office for Minnesota salesmen and customers (R. 215, f. 3), as a clearing house for orders that customers telephoned or sent in (R. 215, f. 3), as a place where complaints might be made or inquiries directed (R. 215, f. 3), and was also available to the appellant's other Minnesota salesmen when they were in Minneapolis, that is, a place where they might use the telephone or do their work (R. 215, f. 3; R. 216, f. 1). Advertising supplies, such as pencils, pads and blotters were available in this office for customers (R. 216, f. 1).

Orders received by appellant's salesmen in Minnesota were transmitted daily to appellant's home office in Iowa where they were approved (R. 216, f. 1). Orders received by appellant from its Minnesota salesmen were acknowledged by it

from the home office in Iowa directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or by mail (R. 216, f. 2). Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit (R. 216, f. 2). Credit extensions and collections were handled by appellant's home office in Mason City (R. 216, ff. 2-3).

Claims for loss of damage were generally handled through the home office (R. 216, f. 3). However, it was not uncommon for customers to present their claims to the Minnesota salesmen who would write the company, informing it of the trouble and asking the company what it wished to do about it (R. 216, f. 3).

Appellant was engaged in selling and delivering cement to Minnesota customers for at least thirty years prior to the commencement of the action here involved (R. 195, f. 1). Forty-eight percent of appellant's entire sales were made to customers within Minnesota (R. 195, f. 1). The price of appellant's product was the delivered price to the customer, although the appellant endeavored to keep the base price and freight rates separate (R. 195, f. 1). In all cases the purchaser paid the price of the product delivered to his place of business and it was impossible to purchase cement from the appellant except at a delivered price. A purchaser could not pick up appellant's products at appellant's plant or office in Iowa (R. 195, f. 2). Appellant's Minnesota salesmen were able to quote customers a delivered price determined by freight rate plus package plus cement (R. 73, f. 3) and the salesmen were authorized by the appellant to tell the

customers the delivered price (R. 74, f. 1). Appellant's merchandise was invoiced and shipped by rail from appellant's home office in Mason City directly to the purchaser (R. 195, f. 2). Appellant's purchasers were located in Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin (R. 195, f. 3). Appellant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no merchandise was stored or kept by it in this state (R. 195, f. 3). Price quotations were prepared and sent out from the home office and changes in price were prepared by that office (R. 195, f. 3). Appellant enjoyed a definite competitive advantage over Minnesota cement companies by reason of the favorable freight rates to the appellant as it was in closer proximity to Southern Minnesota customers than such customers were to Minnesota cement producers (R. 195, f. 3; R. 196, f. 1).

Appellant's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the purchase of merchandise, such orders being subject to acceptance, filling and delivery by the appellant from its home office in Mason City, Iowa (R. 196, ff. 1-2). When sales had been made and orders taken by the Minnesota salesmen and forwarded to appellant's home office the duties of the Minnesota salesmen were not at an end (R. 111, f. 1). The Minneapolis sales office and all of its employees in Minnesota had duties in addition to soliciting orders for merchandise. These duties consisted of a regular and systematic method of contacting potential customers and users of cement products, the promotion and building of good will, the entertainment of customers and the doing of all things necessary to main-

tain and enlarge the volume of business done by the appellant in the State of Minnesota (R. 196, ff. 2-3).

Large quantities of appellant's cement products were used for the building of state and local highways and such orders sometimes called for forty to fifty thousand barrels of cement and in addition the employees of appellant were required to contact builders, contractors and architects and any other potential user of appellant's products (R. 196, f. 3).

In promoting and building good will and in contacting potential customers and users of cement products, the appellant would quote prices to contractors to whom they would not sell directly (R. 80, ff. 1-2). This quotation would be the price for which the contractor could buy the cement from the yard or dealer (R. 80, f. 2). Appellant's salesmen in effect contacted contractors in order to get the order for the dealer so that appellant could in turn sell the dealer the cement (R. 91, f. 2). This activity was common and widespread enough to require the development of a special form for quoting price to contractors (Exh. 17; R. 79, ff. 2-3; R. 82, f. 1).

Appellant's employees in Minnesota, with the exception of the secretary in the Minneapolis office, were all salesmen (R. 197, f. 1). It was their job to sell appellant's products and build good will (R. 197, f. 1). Appellant would sell only to eligible dealers who were lumber and building material supply dealers, contractors and ready mix companies (R. 197, f. 1). Appellant maintained a list of all eligible Minnesota customers in its Iowa office and no matter how an order came into the home office, the company would not sell unless the order had come in from an eligible purchaser (R. 197, ff. 1-2). The appellant's salesmen were provided

ith lists of all eligible purchasers in their territory and ere required, as a part of their job, to call on every potential ıstomer as often as possible (R. 197, f. 2). Salesmen in ıtstate territories called on a customer on an average of very three weeks and in the Twin City district, customers ere called on much more frequently (R. 197, f. 2).

Because of the substantial volume of business carried on in Minnesota, there was a steady and continuous flow of appellant's products into the State of Minnesota at all times R. 197, f. 2). Appellant's activities in Minnesota are regur, systematic and well organized for the selling of appelnt's products (R. 197, f. 3; R. 198, f. 1).

Appellant's predecessor corporation resorted to the courts f the State of Minnesota to enforce its contracts on at least ne occasion (R. 198, f. 1).

The appellant filed no income tax returns with the State f Minnesota for any of the taxable years here involved. The tate of Minnesota, acting through its Commissioner of Taxaon, prepared, on the basis of information available to the ommissioner of Taxation, income tax returns for the appellant for its fiscal years 1933 through 1948 and assessed gainst the appellant the income taxes shown to be due by aid returns (R. 189, f. 3). In the preparation of such returns, ne Commissioner of Taxation used the three-factor formula escribed in Minnesota Statutes, s. 290.19, in determining ne portion of the appellant's overall net income for each f its fiscal years here involved which was to be allocated o Minnesota and subjected to the income tax imposed by his state (R. 190, f.1). The three factors utilized in this ormula are: (1) the ratio of the taxpayer's sales assignable o Minnesota during the year to its total sales for the year

wherever made; (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year (R. 190, ff. 1-2). The appellant did not take issue with the fairness of the formula or the propriety of amounts listed as Minnesota sales, Minnesota property or Minnesota payroll.

The income taxes, penalties and interest assessed against the appellant for its fiscal years ending in 1933 through 1948 are as follows (R. 190, ff. 2-3):

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	$ 806.48	$ 40.32	$ 512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

SUMMARY OF ARGUMENT

I. Analysis of the Tax at Issue in This Proceeding.

The Minnesota law here at issue, Minnesota Statutes, section 290.03, imposes a tax upon the taxable net income of all domestic and foreign corporations, except those taxable under Minnesota Statutes, section 290.02, which own property within Minnesota, or whose business consists exclusively of foreign commerce, interstate commerce, or both.

The Minnesota Supreme Court has held that this tax is a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against interstate commerce; it is not, by dictionary definition, legislative intent, or by operative effect, an excise, franchise, or privilege tax. It is non-discriminatory, applying equally to all taxpayers, resident or non-resident, whether engaged in interstate or intrastate commerce, and is confined to that portion of a taxpayer's income earned from business activities which are fairly apportioned to, and localized within, the State of Minnesota.

The interpretation of this statute by the Minnesota Supreme Court is a part of the statute for purposes of determining whether this taxing statute as applied violates the due process clause or the commerce clause of the United States Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 570, 69 S. Ct. 1291, 1296 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 84, 85, 68 S. Ct. 1475, 1477 (1948).

II. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Its Activities Conducted Within the Taxing State Is Not in Conflict With and Does Not Violate the Due Process Clause of the U. S. Const., Amend. XIV, s. 1.

In considering whether a particular tax is to stand or fall under the due process clause of the U. S. Constitution, Amend XIV, the question for determination is whether the tax as imposed taxes values beyond the jurisdiction of the state imposing the tax. The due process clause is satisfied if the tax in practical operation had relation to opportunities, benefits or protection conferred or afforded by the taxing state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432, 434 (1949).

In the instant case, the taxpayer is present through its extensive localized activities (as summarized in the statement of case) and enjoys in return for any taxes exacted the opportunities, protection and benefits of a modern community serviced by a state government which maintains courts, police, roads and other services of distinct advantage to the building and maintenance of the appellant's tremendous sales volume (48 percent of its total sales) through business outlets within the state.

The fairness of the three-factor formula in apportioning the tax to the commerce carried on within the State of Minnesota is not in issue in this case.

Apportionment formula similar to the three-factor apportionment formula used by the State of Minnesota have on many occasions been upheld against due process attacks.

John Deere Plow Co. v. Franchise Tax Board, 343 U. S. 939, 72 S. Ct. 1036 (1952); *Commonwealth v. Ford Motor Co.*, 324 U. S. 827, 65 S. Ct. 857 (1945); *Butler Bros. v. McColgan*, 315 U. S. 501, 62 S. Ct. 701 (1942).

The very essence of the due process objection is that a tax will reach to income and values beyond the territorial jurisdiction of the state. When the total net income of a taxpayer is apportioned as in the instant case so as to reflect only that portion of the net income properly and fairly assignable to the taxing state, the due process objection has been overcome.

To sustain a tax under the due process clause there must, of course, be some minimal connection between the subject of the tax and the state.

The appellant's contention that there are insufficient connections with the state to be subject to its taxing power is foreclosed by the decision of this court in the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945) and *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946).

The income-producing activities of the appellant in the State of Minnesota are outlined in the findings of fact and the statement of the case. The factual connections between the appellant and the state were far greater in the instant case than in the International Shoe Co. case and were comparable to those in the West Publishing Co. case.

The tax in question is related to the benefits and protection conferred by the State of Minnesota and is imposed only upon that portion of the foreign corporation's income which is fairly attributable to the corporate activity within Minnesota. The extensive activities of appellant are more than

sufficient to meet the requirements of the "minimal connections" required by the due process clause.

III. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Those Activities Localized Within the Taxing State Which Give Rise to That Portion of the Foreign Corporation's Net Income, Which Neither Burdens Nor Discriminates Against Interstate Commerce, Is Not Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Is Not a Condition Precedent to the Foreign Corporation's Engaging in Interstate Commerce Within the Taxing State, Does Not Contravene the Commerce Clause, U. S. Const. Art. I, s. 8.

The decision of the Minnesota Supreme Court is in accord with and is sustained by the decisions of this court.

This court has consistently held that interstate commerce must pay its own way. *Postal Telegraph Cable Co. v. City of Richmond*, 249 U. S. 252, 259, 39 S. Ct. 265, 266 (1919); *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 254, 58 S. Ct. 546, 548 (1938); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 165, 74 S. Ct. 396, 400 (1954).

However, this court has also held that in order to make interstate commerce pay its own way a state tax must meet certain constitutional standards.

The decisions demonstrate that there are various grounds upon which a tax may conflict with the commerce clause. Thus, any tax which is directly imposed upon the privilege

of engaging in interstate commerce will not stand before a constitutional attack upon commerce clause grounds. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295.

The Minnesota net income tax at issue in this proceeding is not a franchise or excise on commerce nor is it imposed on the privilege or franchise of engaging in interstate commerce. It is levied after the interstate commerce transactions within the state have been completed and after all expenses are paid and losses adjusted. Thus, the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow (Minnesota Supreme Court opinion, R. 235, f. 236).

Even though a tax directly imposed on interstate commerce is forbidden, it is well established that a non-discriminatory tax may be levied on net income wholly derived from operations in interstate commerce. *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1947); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct. 45 (1920); *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918).

It is a well recognized and long-standing principle of law that a tax does not discriminate against interstate commerce if other related taxes impose equal burdens on intrastate commerce. *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 70 S. Ct. 806 (1950); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-584, 57 S. Ct. 524, 527 (1937).

The tax at issue does not discriminate against interstate commerce, since all corporations not taxable under Minnesota Statutes, Section 290.03 are subject to tax of equal rate under Minnesota Statutes, Section 290.02.

In fact, if the appellant was not subject to tax in Minnesota it would enjoy an advantageous competitive position with domestic corporations who are subject to a tax of equal rate.

The last remaining grounds for objection raised by the appellant is that the tax imposes a cumulative or multiple tax burden. However, the commerce clause requires only a fair apportionment of the net income to the activities conducted within the taxing state. *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546 (1938). The tax in question in the instant case could not impose a multiple burden upon interstate commerce since it is imposed only upon net income and is limited and confined to that portion of the net income fairly attributable to the activities conducted within the State of Minnesota. This computation is made by the well-recognized three-factor formula which has not been challenged by the appellant.

This same constitutional requirement is imposed upon each taxing state and prevents the doubling up or multiplying of the burden in such a way as to result in the total taxation of more than 100% of the net income of the corporation.

The rule that personal property used in interstate commerce may be taxed in two or more states on an apportionment basis precludes taxation by the domiciliary state on other than an apportionment basis. *Standard Oil Co. v. Peck*, 342 U.S. 382, 72 S. Ct. 309 (1952); *Braniff Airways v. Nebraska Board*, 347 U. S. 590, 74 S. Ct. 757 (1954). The same requirement of apportionment of the tax base should apply with respect to net income taxes and will prevent any mul-

tiple or cumulative taxation of the foreign corporation's net income.

Thus, Minnesota's net income tax, the subject and measure of which is net income, and which is limited and confined to that portion of the net income fairly apportioned and attributed to the corporate activity within the taxing state does not impose a direct burden upon interstate commerce in form nor substance, it does not discriminate against interstate commerce nor does it impose a multiple or cumulative burden. It, therefore, follows that the tax here in question does not violate the commerce clause, U. S. Const. Art. I, s. 8, cl. 3.

ARGUMENT

I. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Its Activities Conducted Within the Taxing State Is Not in Conflict With, and Does Not Violate, the Due Process Clause of the U. S. Const. Amend. XIV, s. 1.

Minnesota Statutes, s. 290.03, imposes a tax upon the taxable net income of all domestic and foreign corporations, except those taxable under Minnesota Statutes, s. 290.02, which own property within Minnesota, or whose business consists exclusively of foreign commerce, interstate commerce, or both.

The Minnesota Supreme Court held that this tax is a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against interstate commerce (R. 231, f. 232):

which is not, by dictionary definition, legislative intent, or operative effect, an excise, franchise, or a privilege tax (R. 231, f. 232). The tax was held to be non-discriminatory, applying equally to all taxpayers, resident or non-resident, whether engaged in interstate or intrastate commerce, and confined to that portion of the taxpayer's income which is fairly apportioned to the State of Minnesota as arising out of business activities which are localized within the State of Minnesota (R. 231, f. 232).

The interpretation of this statute by the Minnesota Supreme Court is a part of the statute as applied, for purposes of determining whether the taxing statute, violates the United States Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 568, 570, 69 S. Ct. 1291, 1295, 1296 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 84, 85, 68 S. Ct. 1475, 1477 (1948).

In considering whether a particular tax is to stand or fall under the due process clause of the U. S. Const. Amend. XIV, s. 1, the question for determination is whether the tax as imposed taxes values beyond the jurisdiction of the state imposing the tax. As stated in *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432, 434 (1949):

> "So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing State."

The court below pointed out the benefits and protection conferred by Minnesota, stating:

> "TAXPAYER RECEIVES EXTENSIVE BENEFITS OF STATE GOVERNMENTAL SERVICES AND ENJOYS THE PROTECTION OF THE STATE COURTS.

"Clearly, this is not a case where a state reaches beyond its borders and fastens its tax talons upon an event having no factual connection with transactions within its borders whereby it is unable to confer anything in return for the exaction. Here instead the taxpayer is present through its extensive localized activities and enjoys, in return for any taxes exacted, the opportunities, protection, and benefits of a modern community serviced by a state government which maintains courts, police, roads, and other services of distinct advantage to the building and maintenance of the taxpayer's tremendous sales volume (48 percent of its total sales volume) through business outlets within the state. It is not amiss to observe that the taxpayer, or its immediate predecessor under a prior incorporation, has already had occasion to seek the benefit and protection of our courts." (R. 230, f. 231; R. 231, f. 231)

The requirement that the tax in practical operation be related to the opportunities, benefits, and protection conferred or afforded by the taxing state is satisfied if the tax is fairly apportioned to the commerce carried on within the state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

The fairness of the three-factor formula provided by Minnesota Statutes, s. 290.19, in apportioning the tax to the commerce carried on within the civilized community provided by the State of Minnesota is not in issue in this case.

The use of the three-factor formula in fairly apportioning income of a unitary business has been sustained by this court on many occasions. *John Deere Plow Co. v. Franchise Tax Board*, 343 U. S. 939, 72 S. Ct. 1036 (1952); *Commonwealth v. Ford Motor Co.*, 324 U. S. 827, 65 S. Ct. 857 (1945); *Butler Bros. v. McColgan*, 315 U. S. 501, 62 S. Ct. 701 (1942).

The very essence of the due process objection is that a tax

will reach to income and values beyond the territorial jurisdiction of the state. When the total net income of a taxpayer is approtioned so as to reflect only that portion of the net income properly and fairly assignable to the taxing state the essence of the tax is its fairness and the due process objection has been overcome.

To sustain a tax under the due process clause there must, of course, be some minimal connections between the subject of the tax and the state.

The appellant's contention that it has insufficient connections with the state to subject it to the taxing power is foreclosed by the decision of this court in the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945).

There the non-domiciliary foreign corporation was engaged solely in interstate commerce. It had no office in the State of Washington and made no contracts there either for sale or purchase of merchandise. It maintained no stock of merchandise and delivered no goods in intrastate commerce. It employed eleven to thirteen salesmen who resided in Washington and whose principal activities were confined to that state. The salesmen's authority was limited to the exhibition of samples and the solicitation of orders from prospective buyers at prices and on terms fixed by the International Shoe Company. The orders were transmitted by the salesmen to offices outside the state for acceptance or rejection. If accepted, the merchandise was shipped from outside the state directly to the purchaser within the State of Washington. This court pointed out in the International Shoe Company decision that unlike an individual the corporate presence without as well as within the state of its origin could be manifested only by activities carried on in its behalf by those

who are authorized to act for it and that in this respect "presence" merely symbolized those activities of the corporation's agent within the state which the courts would deem to be sufficient to satisfy the demands of due process. This court then held that the appellant corporation had subjected itself to the State of Washington's jurisdiction for the purpose of suit and for the purpose of tax. This court pointed out that its activities (less substantial in scope and effect than those carried on in the instant case) established its "presence" and subjected it alike to taxation by the state and to suit to recover the tax.

In *West Publishing Co. v. McColgan,* 328 U. S. 823, 66 S. Ct. 1378 (1946), on facts substantially similar to the facts in the instant case, this court, citing International Shoe Company as authority, affirmed per curiam the decision of the California Supreme Court that the imposition of California's income tax on the apportioned net income of a corporation engaged solely in interstate commerce did not violate the due process clause. Thus, it is apparent that the appellant's continuous and systematic course of solicitation of business in the State of Minnesota for a period of more than thirty years, together with the activities of the maintaining of resident representatives to solicit orders, entertain customers, furnish customers with information, receive and forward customers' complaints, and contact prospective users of their product to urge the purchase of its product from local outlets, maintaining a local service office and permitting its office manager and representative to hold himself out as its district manager and engaging in many other additional local activities is more than sufficient to sustain the tax as against the due process attack.

The localized activities in the instant case were as extensive as the activities of West Publishing Company and International Shoe Company.

More than fifty years ago, in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155, 38 S. Ct. 295, 297 (1918), this court ruled on an analogous situation with respect to Northwestern Consolidated Milling Co., one of seven corporations which were taxed under a Massachusetts excise tax imposed on each of the corporations on the ground that each was doing a local business in the state. In overruling objections to the tax based on the commerce clause of the Constitution and the due process and equal protection clauses of the Fourteenth Amendment with respect to the Northwestern Consolidated Milling Co., this court stated:

> "This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another—and may be taxed by the state, regardless of the motive with which it is conducted." (246 U. S. 147, 155)

The facts in the case at bar show that appellant's resident representatives contacted prospective users of its product inducing them to buy its product through and from the appellant's established local outlets or dealers (R. 196, ff. 2-3).

The court below emphasized this facet of the appellant's Minnesota activities (R. 230, ff. 2-3). Here the appellant has conducted within the State of Minnesota, income-producing activities and transactions which, though related to interstate commerce, have become separated from the direct flow of that commerce and are so localized within the state as to amount to a local business, enjoying all of the benefits and advantages of a local business and should pay its fair share of the costs of government.

Appellant, in its brief, p. 15, n. 1, cites *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), and alleges that the tax sought to be imposed in the instant case has no relationship to the presence in the Minnesota of appellant's solicitors. This position is without merit. Certainly appellant did not carry on its activities within the State of Minnesota for nothing. It was these very extensive activities which gave rise to that portion of the net income which has been fairly apportioned to Minnesota and subjected to the tax in question.

Appellant continually refers to mere solicitation contending that this does not provide "local incidents of operation" which would enable the state to tax a foreign corporation which in all other respects stays at home. In the instant case, it is apparent from the facts that the appellant engaged in something more than "mere" solicitation.

Appellant employs resident sales representatives in Minnesota who regularly and systematically solicit orders from eligible purchasers (R. 227, f. 228; R. 230, f. 231). As was stated by this court in Nippert v. City of Richmond, 327 U. S. 416, 426, 66 S. Ct. 586, 591 (1946):

> "In view of the ruling in International Shoe Company v. Washington, supra, we put aside any suggestion that

'solicitation,' when conducted regularly and continuously within the state, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. * * *."

Appellant has carried on a course of conduct which is more than regular and continuous solicitation. Appellant rents and maintains an office in the taxing state which is used to some extent as a central office and as a clearing house for orders and complaints. A full time secretary is employed in this office, telephone lines are maintained, it is listed in the telephone and city directories as the office of appellant. One of the district representatives is in charge of this office and with the appellant's knowledge holds himself out as district manager (R. 227, f. 227). Appellant has within the state office equipment, good will advertising and other material and also owns the automobiles kept within the state driven by its Minnesota salesmen (R. 227, f. 228).

In addition, the appellant's salesmen who are residents within the taxing state regularly and systematically contact users of cement products to induce them to buy from taxpayer's established local outlets and dealers. As pointed out earlier, an activity as broad as this was held sufficient to sustain an excise tax imposed upon a foreign corporation for the privilege of doing a local business with respect to the tax upon Northwestern Milling Company, in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155, 38 S. Ct. 295, 297 (1918), in addition, the appellant's representatives promote good will and furnish advertising material to customers, entertain customers, and receive and forward complaints on occasion (R. 228, f. 228). These activites result

in a flow of taxpayer's product into Minnesota which constitutes about 48 percent of its sales volume (R. 228, f. 228). Certainly activities as broad and comprehensive as appellant's activities within the State of Minnesota resulting in 48 percent of its sales volume cannot be dismissed as "mere solicitation".

In *Miller Bros. Co. v. State of Maryland*, 347 U. S. 340, 74 S. Ct. 535 (1954), relied upon by appellant with respect to its due process objection, it must be pointed out that in that case the taxpayer had no solicitors or agents within the taxing state, made no sales within the taxing state, did not accept telephone or mail orders, and its only contact with the taxing state was that the taxpayer's newspaper, radio and advertising reached the taxing state, some sales circulars were mailed to customers within the taxing state and some deliveries were made to Maryland locations. The tax was stricken as repugnant to the Fourteenth Amendment and this court stated:

> "But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U. S. 344-345)

The Miller Bros. case holds that the activities were less than the minimum required by the due process clause. Certainly the minimal activities there cannot be compared with the extensive activities of appellant within the State of Minnesota.

Appellant places some reliance on the argument that title to the products sold passed at the moment of delivery to the common carrier in Iowa, citing McLeod v. J. E. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023 (1944). It is to be pointed

out that in that decision the tax was in violation of the commerce clause and was stricken on that ground alone.

As ably stated by Mr. Justice Rutledge in his dissent in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 349, 351, 64 S. Ct. 1030, 1032 (1944):

> "Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that 'title passes' on delivery to the carriers in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is a will-o'the wisp, insufficient to crux a due process connection from selling to consuming state * * *."

It is to be noted that with respect to rail shipment of appellant's merchandise the Minnesota purchaser has no choice for the record shows it was impossible for the Minnesota purchaser to buy cement at other than the delivered price of cost of cement, plus package plus freight and it was impossible for the Minnesota purchaser to pick up the product at appellant's plant or office in Iowa (R. 62, f. 3; R. 115, ff. 1-2; R. 119, f. 2; R. 133, f. 1; R. 154, f. 3; R. 155, ff. 1-2). Certainly these facts indicate that the delivery to the carrier in Iowa is merely a technical consideration not relevant for the purpose of determining the power of a state to impose a general net income tax such as we have here.

Appellant asks:

> "What has Minnesota given this taxpayer for which they ask a return?"

and places great stress on the fact that the judgment demanded is over $100,000 (Appellant's Brief, pp. 22, 23).

It is pertinent to point out that the record shows that the tax sought to be collected here covered sixteen years, 1933 to 1948, inclusive, and amounted in total tax to $67,217.45, the remaining amount in issue, being penalties and interest. It should be pointed out also that in the year 1946, which is the year of greatest tax, the tax amounted to $8,035.85; that in 1943, the tax amounted to $10.14; that in the years 1933 through 1948 the tax amounted to less than $5,000 in each year with the exception of 1939, 1941, 1946 and 1948.

In addition, appellant contends that no benefits were conferred or afforded by the State of Minnesota to or upon the appellant. Certainly it is apparent that the State of Minnesota provides a market in which the appellant carries on its activities and that appellant benefits from the market provided and from all of the protection afforded by the State of Minnesota. Like the activities in *Field Enterprises v. Washington*, 47 Wash. 2d 852, 289 P. 2d 1010, aff'd per curiam 352 U. S. 806, 77 S. Ct. 55 (1956); *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, aff'd per curiam 328 U. S. 823, 66 S. Ct. 1378 (1946); and *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), the activities carried on in behalf of appellant were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights.

The tax in question is fairly apportioned to appellant's activities within the state which are so localized in nature as

to compete with local business and enjoy all the opportunities, benefits and protection afforded by the State of Minnesota. Appellant is *present* within the State of Minnesota and carries on its activities under the protection of the laws of Minnesota. It follows that appellant should pay its own way.

II. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Those Business Activities Localized Within the Taxing State Which Give Rise to That Portion of the Foreign Corporation's Net Income, Which Neither Burdens Nor Discriminates Against Interstate Commerce, Is Not Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Is Not a Condition Precedent to the Foreign Corporation's Engaging in Interstate Commerce Within the Taxing State, Does Not Contravene the Commerce Clause, U. S. Const. Article I, Sec. 8, cl. 3.

The court below, in sustaining the tax here in question, stated:

> "Tax enactments violate the commerce clause when they either profess to regulate interstate commerce, or affect it so directly as to amount to a regulation, or discriminate against it so as to place it at a disadvantage with intrasate commerce. In the present case we have a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against the free flow of interstate commerce. It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative in-

tent, or by operative effect be construed or classified as an excise, franchise, or privilege tax. It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes.* In this respect, it involves no regulation of, or burden upon, interstate commerce." (R. 231, f. 232)

The state court has construed the statute in question as a general net income tax the subject and measure of which is that portion of the net income of the foreign corporation which is fairly attributable to the activities carried on within the taxing State of Minnesota. It is not a measure or substitute for any other tax and is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. It is not a franchise tax. Failure to pay the tax does not work a forfeiture of any right to continue to engage or continue to engage in interstate commerce and it is collectible only by resort to the ordinary means of collecting taxes.

The Minnesota Supreme Court's interpretation of the statute here in question is a part of the statute for the purpose of determining whether there has been a violation of the Federal Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 69 S. Ct. 1291 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S. Ct. 1475 (1948).

The decision of the court below is in accord with and is sustained by the decisions of this court. The decisions of this court demonstrate that there are various grounds upon which a tax may conflict with the commerce clause. Thus, any tax which is directly imposed upon the privilege of en-

gaging in interstate commerce will not stand before a constitutional attack upon commerce clause grounds. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); *Cheney Bros. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918). These cases hold that the states do not have the power to impose a tax directly upon the privelege of engaging in interstate commerce.

Even though a tax directly imposed on interstate commerce is forbidden a tax may be levied on net income wholly derived from operations in interstate commerce. *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1946); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct. 45 (1920); *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918).

This court, in *Peck and Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918), pointed out that net income was not a new *subject* of tax and held that the tax, the subject of which was the net income of a corporation engaged in exportation, was not a tax upon the exportation of articles in violation of U. S. Const. Art. I, sec. 9, cl. 5. This court then stated:

> "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton v. Baltic Mining Co., supra, 240 U.S. p. 113, 36 S. Ct. 278, 60 L. Ed. 546), it is both nominally and actually a general tax. It is not laid on income from

exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

"For these reasons we hold that the objection urged against the tax is not well grounded." (247 U.S. 165, 174)

In *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918), this court again pointed out the distinction between direct and indirect burden and stated at 247 U. S. 321, 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of

whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax canot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states."

More recently, in a case on all fours with the case at bar, *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, aff'd per curiam 328 U.S. 823, 66 S. Ct. 1378 (1946), it was ably stated by Mr. Justice Traynor of the California Supreme Court.

"In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce,

does not conflict with the commerce clause. (United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 326, 329; Shaffer v. Carter, 252 U. S. 37, 57; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119-120; Bass, Ratcliffe & Gretton Ltd. v. State Tax Comm., 266 U. S. 271; Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413, 416; Butler Bros. v. McColgan, 315 U. S. 501.) A state 'may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, supra. Congress may levy a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision * * * Peck & Co. v. Lowe, 247 U. S. 165; Barclay & Co. v. Edwards, 267 U. S. 442, 447.' (New York ex rel Cohn & Graves, 300 U. S. 308, 313-314.) 'But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business * * * A tax may be levied on net income wholly derived from interstate commerce.' (McGoldrick v. Berwind—White Coal Mining Co., 309 U. S. 33, 46). State power to impose a tax on net income wholly derived from interstate commerce was recently reaffirmed in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 656; see also International Harvester Co. v. Wisconsin, 322 U. S. 435, 442.) Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. (Memphis Natural Gas Co. v. State Tax Comm., —— U. S. ——, 65 S. Ct. 440, same case 19 So. 2d. 477; Parke Davis & Co. v. Cook, —— U. S. ——, 65 S. Ct. 436, same case 31 S. E. 2d. 728).

"The use of income as the measure rather than the subject of the tax in the Bank and Corporation Fran-

chise Tax Act is in conformity with a method of taxing national banks authorized by Section 5219 of the United States Revised Statutes that permits the inclusion of income in the measure of the tax that could not be made the subject of the tax." (Pacific Co. Ltd. v. Johnson, 212 Cal. 148, 285 U. S. 480; Educational Films Corp. v. Ward, 282 U. S. 379; Flint v. Stone Tracy Co., 220 U. S. 107.) The use of income as the subject of the tax in the Corporation Income Tax Act is in conformity with the decisions of the United States Supreme Court, cited above, that a state may tax net income from interstate commerce even though it cannot tax the privilege of engaging in interstate commerce. Before the enactment of the Corporation Income Tax Act, foreign corporations engaged in interstate business within the state without being subject to a tax burden comparable to the franchise tax imposed on domestic corporations and other foreign corporations competing in the same market. The Corporation Income Tax Act removed that discrimination." (27 Cal 2d 705, 708-710)

In the present case the court below points out that the tax is a general net income tax limited and apportioned to the income earned from and within the state which neither burdens nor discriminates against the free flow of interstate commerce and is not used as a measure or substitute for any other tax and cannot by dictionary definition, legistative intent or operative effect be construed or classified as an excise, franchise or privilege tax (R. 231, f. 232). The court goes on to point out that the tax does not involve a regulation of interstate commerce when it stated:

"It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture*

of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes." (R. 231, ff. 232, 233)

The court below then went on to point out that the tax here involved placed no burden on interstate commerce, stating:

"Clearly, a net income tax places no burden upon interstate commerce. *The tax is levied after the interstate transactions localized within the state have been completed, and after all expenses have been paid and losses adjusted, and after the taxpayer, as the recipient of the remaining net income, is free to use it as he chooses. Thus the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.*" (R. 235, ff. 237, 238)

Even though a tax does not impose a direct burden upon interstate commerce, the tax must not in practical operation or effect discriminate against interstate commerce. *Memphis Steam Laundry, Inc. v. Stone*, 342 U. S. 389, 72 S. Ct. 424 (1952); *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586 (1946); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592 (1887).

However, the tax is discriminatory only when interstate commerce is subjected to a tax burden greater than local business; if the tax imposed places no greater burden on interstate commerce than it does on local business, then there is no discrimination against interstate business. *Capital Greyhound Lines v. Brice*, 339 U. S. 542, 70 S. Ct. 806 (1950); *Henneford v. Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524 (1937).

The court below, in discussing the application of the tax in question, stated:

> *"It applies equally to all taxpayers, resident or non-resident, and whether they are engaged in either interstate or intrastate commerce. Significantly Minnesota, in dealing with resident and domestic taxpayers located within its borders and doing business partly within and partly without this state, imposes the tax only on that portion of income allocable to earnings produced within this state.* As applied to non-resident taxpayers engaged in interstate commerce, it is confined to that portion of their income earned from business activities which are fairly apportioned to, and localized within the state. It is not an arbitrary imposition since the taxpayer has the opportunity of voluntarily preparing and filing his own tax return according to the information which he himself possesses. If any error is thought to occur in the levy, measure, or the amount of the tax as based on his own return, or upon a return prepared for him by the tax commissioner, he may, like any resident taxpayer, petition the State Board of Tax Appeals for relief and after that he has a further right of appeal to this court." (R. 233, f. 234)

In the case at bar the tax does not discriminate against interstate commerce in favor of intrastate business nor does it discriminate against a foreign corporation in favor of domestic corporations. And nothing in the record suggests that there has been any discrimination against the appellant in favor of local or intrastate business or in favor of domestic corporations.

Where the tax does not, in form or in substance, impose a direct burden upon interstate commerce and is not discriminatory against interstate commerce, it still must meet the possible objection that it imposes a cumulative or multiple tax burden. *Michigan-Wisconsin Pipe Line Co. v. Calvert,*

317 U. S. 157, 74 S. Ct. 396 (1954); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 59 S. Ct. 325 (1939); *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913 (1938); *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546 (1938). But a tax does not impose a multiple burden if it is apportioned to the commerce carried on within the taxing state. *Western Livestock v. Bureau of Revenue*, supra.

Appellant contends that the tax in question could impose a multiple burden on interstate commerce and should, for that reason, be stricken as invalid and void under the commerce clause. The fallacy of the argument lies in the fact that the commerce clause requires a fair apportionment of the net income to the activities conducted within the taxing state. This constitutional requirement which is imposed upon each taxing state prevents the doubling up or multiplying of the burden in such a way as to result in a total taxation of more than 100% of the net income of the corporation.

With respect to the possibility of imposition of a net income tax in the state of domicile, we have the very concise statement of the court below:

> "We have, however, the suggestion, although there is no support for it in the record, that Iowa, as the domiciliary state, may attempt to impose a tax upon taxpayer's entire net income wherever earned. Most states, including Minnesota, however, permit their domiciliaries to apportion the net income derived from sources within the state and thereby excuse payment of a tax on net income derived from out-of-state sources.[1] Where, however, a domiciliary state does not voluntarily permit the apportionment of the total net income of the taxpayer, the United States Supreme Court has, by its

[1] Altman & Keesling, Allocation of Income in State Taxation, p. 31; M.S.A. 290.19.

treatment of a potential double tax burden in another situation, indicated that it may require the domiciliary state to permit apportionment. In the analogous situation the court, in dealing with an ad valorem tax, has held that a state other than the corporate domicile may impose a tax on the taxpayer's instrumentalities utilized in interstate commerce. Where, however, a tax is imposed by two or more states on an apportionment basis, the court declared that the *domiciliary* state is precluded from taxing all of taxpayer's property.[2] If the domiciliary state is required to apportion in the case of an ad valorem tax, there is no reason why it may not be required to do so with respect to a tax imposed upon taxpayer's net income." (R. 234, f. 236; R. 235, f. 236)

The rule that personal property used in interstate commerce may be taxed in two or more states on an apportionment basis precludes taxation by the domiciliary state on other than an apportionment basis. *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways v. Nebraska Board*, 347 U. S. 590, 74 S. Ct. 757 (1954). The same requirement of apportionment of the tax base, whether imposed by a domiciliary or a non-domiciliary state, should apply with respect to net income taxes and will prevent any multiple or cumulative burden upon the interstate commerce of the foreign corporation.

Appellant, in its brief, (p. 29), to illustrate discrimination and multiple burden, cites an example of a corporation, identical in operation to the appellant, except that its plant and main office is in Minnesota, and its sales and promotion activities in other states.

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[2]Standard Oil Co. v. Peck, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427; Braniff Airways v. Nebraska Board, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967.

By appellant's assumed allocation, which is contrary to the Minnesota law and regulations, and the evidence introduced in this case, it arrives at a percentage of income assignable to Minnesota of 99.424%.

Appellant's error in its hypothetical lies in assigning 100% of the sales to Minnesota. The only authority cited is vague references to section 290.19 and the regulations thereunder and *State v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N. W. 2d. 664 (1956).

The Minnesota law, section 290.19, subdivision 1 (4) (set forth in appendix B) is very clear as to what is considered Minnesota sales. It provides:

> "For the purposes of this section, in determining the amount of sales made within Minnesota, there shall be excluded therefrom sales negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer or by his agents or agencies outside the state and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises."

The Income Tax Director of the State of Minnesota, Wm. G. Burkman, testified (R. 40, f. 1) that sales are allocated to the state in which the office of origin of the sale is located.

There is nothing in the case of *State v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N. W. 2d 664 (1956), cited by the appellant as authority for its conclusion on assignability of sales, relating to that subject. The issues in that case involve the amount of the Federal income tax deduction, and whether any portion of the taxpayer's dividend received credit may be disallowed.

Consistent with the law and the testimony, the formula used in allocating income to Minnesota of a Minnesota cor-

poration with its plant in Minnesota and activities in Iowa comparable to the appellant's would be:

(a) *Tangible property in Minnesota*
Total tangible property =.....%

(b) *Payroll in Minnesota*
Total payroll =.....%

(c) *Sales originating from Minnesota offices (assignable to Minnesota)*
Total sales =.....%

(d) Total .....

(e) Arithmetic average of (a) (b) and (c) (d÷3) .....%

Applying this to the assumed facts would result in a much smaller portion of the total net income assignable to Minnesota than the appellant asserts, and when added to the portions attributable to other states having fair apportionment formulae would result in taxing no more than 100% of the appellant's income.

The appellant's charge of discrimination and undue burden based on the general application of the three-factor formula is, therefore, not well founded.

With reference to the instant case, the appellant did not contend at the trial that any non-Minnesota sales were included in the Minnesota sales factor. Since no evidence was introduced, the Commissioner's determination, which was based on the best evidence available to him, is by statute prima facie correct (Minnesota Statutes, section 290.48, subd. 8).

We have demonstrated that the tax in question does not impose a direct burden upon interstate commerce since it is imposed only upon the net income of the appellant and is limited and confined to that portion of the net income fairly

attributable to the activities conducted within the State of Minnesota. Thus, the tax is imposed upon net income which, as indicated in *Peck and Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918), is as much outside the flow of commerce as property or goods which have come to rest within the taxing state. The tax in question does not discriminate against interstate commerce in favor of intrastate commerce nor against foreign corporations in favor of domestic corporations and it does not impose a multiple or cumulative tax burden. Nothing in the record suggests that appellant is, at the present time, being taxed on more than 100% of its net income by any combination of states. If any additional states should seek to impose a net income tax upon the appellant, their taxing acts would be subject to the scrutiny of this court and would be held to the requirement that the tax must not impose a direct burden, must not discriminate, and must not tax more than their fair share of the net income of the appellant. The tax here in question does not, in form or in substance, violate the U. S. Const., Art. I, sec. 8, cl. 3.

The issues in the case at bar have already been decided by this court in *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946). The West case is on all fours with the case at bar. The points of identity and similarity are obvious. In both the case at bar and in the West Publishing Co. case the subject and the measure of the tax is the net income of a foreign corporation engaged solely in interstate commerce. The tax is limited and confined to that portion of the foreign corporation's net income fairly attributable to the taxing state and the activities carried on therein. Both corporations had an office or offices in the taxing state. Both corporations had resident employees with-

in the taxing state devoting their entire time to soliciting orders and performing other services which were an integral part of the interstate business of the employing corporation. While the West Publishing Co. employees were entitled to receive payments and adjust complaints and collect delinquent accounts and the appellant in the instant case did not premit or authorize the Minnesota salesmen to receive payments, collect accounts or adjust complaints, the appellant's employees in the case at bar performed other services equally as important to the conduct of the interstate business. In the case at bar, the appellant's salesman acted as a conduit through which complaints could be made and induced local users of appellant's product to purchase the product from appellant's usual outlets or dealers in the state. Both states provided a market in which the foreign corporations operated in competition with local business and the agents of both corporations received the same protection and other benefits from the state as agents carrying on business activities for principals engaged in intrastate business. The state in each case protected the plaintiff's business and transactions within its borders and maintained courts in which the foreign corporations could enforce payment for the sale of its product.

A comparison of West Publishing with *Spector Motor Sevice v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); and *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918), emphasizes the distinction between imposing a tax directly upon the privilege of doing an interstate business and the imposition of a tax on the net income of a foreign corporation engaged solely in interstate commerce where the tax is limited and confined to that portion of the net income of the foreign corporation

which is fairly attributable to the activities carried on within the taxing state. As the court below pointed out, it is significant to note that the California statutory scheme of taxation is similar to that of Minnesota (R. 241, f. 242; R. 242, f. 243).

CHENEY BROS. COMPANY v. COMMONWEALTH OF MASSACHUSETTS, 246 U. S. 147, 38 S. Ct. 295 (1918), DISTINGUISHED.

A Massachusetts excise tax was imposed on each of seven foreign corporations on the ground that each was doing a local business within the state. This court struck down the tax with respect to Cheney Bros. and sustained the tax with respect to the other six corporations. Cheney Bros. maintained a selling office in Boston with one office salesman and four other salesmen who travelled throughout the New England states, in the solicitation and taking of orders subject to approval by the Connecticut home office. The goods ordered were shipped directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. Copies and records of orders were retained in the Boston office but no bookkeeping was done there and the salesman and the office rent were paid directly from Connecticut. This court struck down the Massachusetts tax on Cheney Bros. Co. stating that it was an excise tax on the privilege of engaging in interstate business and repugant to the commerce clause.

In the case at bar, the tax is not an excise tax for the privilege of engaging in interstate commerce, but is purely a general net income tax. It is interesting to note, however, that with respect to the Northwestern Consolidated Milling Company, one of the seven corporations involved in the Che-

ney Bros. case upon which the tax in question had been imposed, this court, noting that the corporation was engaged in local activity by its practice of soliciting orders for their wholesalers (thereby increasing its own sales to the wholesaler) held that this activity was sufficient to sustain even an excise tax against commerce clause objections.

In the case at bar, the court below emphasized the similarity of appellant's operations to the operations of Northwestern Consolidated Milling Company in the Cheney Bros. case when it stated:

> "In Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (cited in the Alpha case), involving consideration of the validity of an excise tax imposed upon seven foreign corporations, each differently situated, we have a good illustration of the principle that a state may impose a valid tax if the proper constitutional channel is selected. One of the foreign corporations involved therein was the Northwestern Consolidated Milling Company, which, like the instant taxpayer, had localized its business within the state." (R. 239, f. 240)

ALPHA PORTLAND CEMENT COMPANY V. MASSACHUSETTS, 268 U. S. 203, 45 S. Ct. 477 (1925), DISTINGUISHED.

In the Alpha case it was conceded that the taxpayer was engaged exclusively in interstate commerece.

The tax imposed in the Alpha case was again an excise tax—a tax on the privilege of engaging in interstate business. The activities of the corporation within Massachusetts were substantially the same as the activities of Cheney Bros. in Cheney Bros. Co. v. Massachusetts. The Alpha case is an application of the direct-indirect burden rule and does nothing more than emphasize the Cheney case and points out

that a state has no power to impose a tax directly on the privilege of engaging in interstate commerce. This court pointed out that the right to lay taxes on tangible property or on income was not involved. 268 U. S. 203, 216.

In the case at bar, the tax is not imposed upon the privilege of engaging in interstate commerce. The tax thus is not a direct burden on that commerce. The tax in the case at bar is a net income tax and as is specifically stated by this court the Alpha case does not involve the right to lay taxes on the income of a foreign corporation carrying on local activities within the taxing state.

SPECTOR MOTOR SERVICE V. O'CONNOR, 340 U. S. 602, 71 S. Ct. 508 (1951), DISTINGUISHED.

In the Spector case, the tax in question was actually imposed upon the "franchise for the privilege of carrying on or doing business within the state". The Connecticut Supreme Court defined the tax in question as a tax or an excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign, 340 U. S. 602, 606, and this was held by this court to be a tax placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state. 340 U. S. 602, 608.

This court indicated that the tax was stricken simply for the reason that it was imposed directly upon the privilege of engaging in interstate commerce and said:

> "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." 340 U. S. 602, 608.

and went on to state at 340 U. S. 601, 608, 609:

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The state is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the state and non-discriminatory."

The tax in Spector Motor Service decision was not stricken because the corporation was engaged *solely* in interstate commerce. The tax was invalid for the reason that a tax; even though it be fairly apportioned and non-discriminatory and measured by net income, may not be directly imposed on the privilege of engaging in interstate commerce.

West Publishing Co v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946), points out the distinction between a tax imposed upon net income and a tax imposed on the privilege of engaging in interstate commerce.

In the West Publishing Co. case, this court affirmed per curiam the decision of the California Supreme Court with respect to the California tax imposed upon the apportioned net income of a foreign corporation engaged solely in interstate commerce.

With respect to the direct burden question the California Supreme Court at 27 Cal. 2d 705, 708-710, stated:

"In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. (citing cases) A state 'may tax net income from operations in interstate commerce, although a tax from the commerce is forbidden, U. S. Glue Co. v. Oak Creek, 247 U. S. 321, Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445. * * *"

Respondent agrees with appellant's statement: "Certainly those engaged in interstate commerce must bear their just share of state taxes—or, as one former member of this court put it, 'even interstate commerce must pay its way.'" (Brief of Appellant, p. 34)

In the case at bar, we have demonstrated that the tax here involved does not impose a direct burden upon interstate commerce—that the tax here in question has no deterrent effect upon interstate commerce for the tax is levied after the interstate commerce transactions have been completed, after the expenses have been paid and losses adjusted, and after the taxpayer, as the recipient of the remaining income, is free to use it as he chooses. Thus, the tax is imposed only after the stream of income-producing interstate commerce has ceased to flow. It has been demonstrated that the tax is non-discriminatory and does not and cannot impose any multiple burden upon the foreign corporation engaged in

interstate commerce. The theme of the tax in question is fairness and the State of Minnesota seeks only to have appellant assume a share of the cost of government commensurate with the protections and benefits it receives.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Minnesota be affirmed.

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APPENDIX "A"

The original enactment in 1933 of the statute which is now coded as Minnesota Statutes, section 290.03, provided:

"RATE OF TAX. (a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in sub-section (b) hereof, computed in the manner and at the rates hereinafter provided.

"(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year."

Laws Minnesota 1933, Ch. 405, Article II, section 3, p. 690.

In 1937, the statute was amended to read:

"Sec. 3. RATE OF TAX. That Laws 1933, Chapter 405, Section 3, be and the same is hereby amended so as to read as follows:

"Sec. 3. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations whose business within this state during the taxable year consists

exclusively of foreign commerce, interstate commerce, or both;

"(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

"(c) Estates of decedents dying domiciled within or without this state; and

"(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1937, Extra Session, Ch. 49, section 3, page 61.

In 1941, the statute was amended to read:

"Section 1. LAW AMENDED. Mason's Supplement 1940, Section 2394-3, is hereby amended to read as follows:

"2394-3. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.

"(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year.

"(c) Estates of decedents, dying domiciled within or without this state, and

"(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1941, Ch. 550, section 1, p. 1153.

In 1945, the statute was amended to read:

"Section 1. Minnesota Statutes 1941, Section 290.03, is hereby amended to read as follows:

"290.03. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and,

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1945, Ch. 410, section 1, p. 787.

APPENDIX "B"

290.19. Net income to be allocated. Subdivision 1. Computation when business conducted partly within state; apportionment. The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deduction of the kind permitted by section 290.09 so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

(1) If the business consists of the manufacture in Minnesota or within and without Minnesota of personal property and the sale of said property within and without the state, the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(a) The percentage which the sales made within this state and through, from or by offices, agencies, branches or stores within this state is of the total sales wherever made;

(b) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and,

(c) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(d) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentages: 70 per cent of the percentage determined under clause (1) (a), 15 per cent of the percentage determined under clause (1) (b), and 15 per cent of the percentage determined under clause (1) (c);

(2) (a) In all other cases the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(1) The percentage which the sales, gross earnings, or receipts from business operations, in whole or in part within this state bear to the total sales, gross earnings, or receipts from business operations whenever conducted;

(2) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and

(3) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(4) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentage: 70 per cent of the percentage determined under clause (2) (a), 15 per cent of the percentage determined under clause (2) (b), and 15 per cent of the percentage determined under clause (2) (c);

(b) If the methods prescribed under clause 2 (a) will not properly reflect taxable net income assignable to the state, there may be used, if practicable and if such use will properly and fairly reflect such income, the percentage which the sales, gross earnings, or receipts from business operations, in whole or in part, within this state bear to the total sales, gross earnings, or receipts from business operations wherever conducted; or the separate or segregated accounting method;

(3) The sales, pay-rolls, earnings, and receipts referred to in this section shall be those for the taxable year in respect of which the tax is being computed. The property referred to in this section shall be the average of the property owned or used by the taxpayer during the taxable year in respect of which the tax is being computed;

(4) For the purposes of this section, in determining the amount of sales made within Minnesota, there shall be excluded therefrom sales negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer or by his agents or agencies outside the state and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises. If the commissioner finds that the taxpayer maintains an office, warehouse or other places of business outside the state for the purpose of reducing its tax under this section it shall in determining the amount of taxable net income include therein the proceeds of sales attributed by the taxpayer to the business conducted at such place outside the state.

Subd. 2. Application of methods. The methods prescribed by subdivision 1 shall apply wherever and in so far as the

business carried on within this state is an integral part of a business carried on both within and without this state.

Subd. 3. Application of sections 290.17 and 290.18. Nothing in this section shall prevent the application of sections 290.17 and 290.18 to that portion of a taxpayer's income which is not from a trade or business carried on partly within and partly without this state.

[Sec. 290.19 R. 5]

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 12

STATE OF MINNESOTA,
Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,
Appellant.

On Appeal from the Supreme Court of the State of Minnesota

Amicus Curiae Brief for the State of California in Support of Respondent, State of Minnesota

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 12

STATE OF MINNESOTA,
Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,
Appellant.

On Appeal from the Supreme Court of the State of Minnesota

Amicus Curiae Brief for the State of California in Support of Respondent, State of Minnesota

---

INTEREST OF THE AMICUS CURIAE

Taxes imposed with respect to net income derived in California, whether from intrastate commerce or interstate commerce, constitute an important segment of the tax system of the state. *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P.2d 861 (1946), affirmed *per curiam*, 328 U.S. 823 (1946).

ARGUMENT

I. This Court Has Upheld Nondiscriminatory Taxes on or Measured by Apportioned Net Income as Among the Fairest Taxes Imposed by States on Corporations Conducting Business in More Than One State. Serious Impairment of a State Program to Employ This Fair Method of Taxation Would Result if Corporations Which Engage Exclusively in Interstate Commerce Were Permitted to Conduct Their Activities in a State Free from Any Tax with Respect to the Income Derived from the Activities in That State.

Nondiscriminatory taxes on or measured by fairly apportioned net income have been accepted as among the fairest taxes imposed by states on businesses conducted in more than one state. *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 329 (1918); *Shaffer v. Carter*, 252 U.S. 37, 51 (1920); *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509 (1942). Cf. *Peck & Co. v. Lowe*, 247 U.S. 165, 175 (1918); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

It is well established that if a taxpayer is engaged in both intrastate and interstate commerce, a state may impose a tax on the privilege of carrying on the intrastate commerce and the tax may be measured by a fair proportion of the taxpayer's net income from both intrastate and interstate commerce. *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120 (1920). See *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609-610 (1951).

A state's effort to carry out a fair program of taxation involving nondiscriminatory taxes on or measured by apportioned net income would be seriously impaired if corporations engaged exclusively in interstate commerce were permitted to conduct their activities in the state free from any tax with respect to income derived from activities in the state. Discrimination would be created in favor of such

corporations as against corporations which engaged in some intrastate commerce as well as interstate commerce, and also as against competitive business that happened to be operating in wholly intrastate commerce. A financial inducement would exist, moreover, for corporations to so arrange the structure of their operations in the taxing state as to be engaged only in interstate commerce. This could further thwart the efforts of a state to administer a program of taxation having as its objective the payment of a nondiscriminatory tax on fairly apportioned net income of all corporations deriving income from activities conducted in the taxing state.

It has long been established, as we have seen, that states can impose a tax on corporations which engage in some intrastate commerce measured by a fair proportion of the taxpayer's net income from both intrastate and interstate commerce. There would seem to be no reason inherent in the policy behind the commerce clause why corporations which engage only in interstate commerce should have their net income wholly free from taxation while corporations which engage in some intrastate commerce but whose interstate commerce is just as much interstate as that of any others are subject to tax with respect to their net income including that from interstate commerce.

So far as the commerce clause is concerned, appellant's position in effect is that regardless of how extensive a corporation's activities in interstate commerce in the taxing state may be, it simply is impossible for the state to impose a tax with respect to any portion of its net income derived from those activities.

We believe this Court has provided a contrary answer in precedents already making clear that a state may impose a tax on net income derived exclusively from interstate commerce.

II. This Court Consistently Has Adhered to the View That a Tax on Net Income Derived Exclusively from Interstate Commerce, as Distinguished from a Tax on the Privilege of Engaging in Interstate Commerce, Does Not Violate the Commerce Clause.

There is no case in which this Court has held that a general nondiscriminatory tax on net income, as distinguished from an excise or privilege tax, violates the commerce clause. On the contrary, this Court frequently has pointed out the distinction between a tax on the exercise of a constitutional right and a tax on property used in, or income received from, the exercise of that right. In the case of *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a case involving a license tax for the privilege of engaging in certain religious activities, the Court declared (page 113):

> "* * * A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce *(McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 56-58), *although it may tax the property used in, or the income derived from, that commerce*, so long as those taxes are not discriminatory. Id. p. 47 and cases cited * * *". (Emphasis added.)

And, at page 112 of the *Murdock* opinion, the Court observed:

> "* * * We have here something quite different, for example, from a *tax on* the *income* of one who engages in religious activities or a *tax on property* used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. * * *" (Emphasis added.)

A tax for the privilege of importing has been held invalid, *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S.

218 (1933), but a tax on net income from exporting has been upheld, *Peck & Co. v. Lowe*, 247 U.S. 165 (1918).

These examples are merely illustrative of the well-defined distinctions drawn by this Court between privilege taxes and taxes on property or on income.

One of the foundation cases relied upon by this Court in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609 (1951), in holding invalid a tax on the privilege of engaging in interstate commerce, is *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925). It is of particular significance, therefore, that in the *Alpha Portland Cement* case this Court carefully pointed out that while it was striking down a tax on the privilege of engaging in interstate commerce its action was not to be construed as applying to taxes on property or income. The Court said, in this regard (page 216):

> "* * * *The right to lay taxes on tangible property or on income is not involved;* * * *"* (Emphasis added.)

This Court consistently has upheld a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce.

The Court has stated flatly that a state may impose a tax on net income derived exclusively from interstate commerce. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, this Court said (page 46):

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business * * * *A tax may be levied on net income wholly derived from interstate commerce.* * * *"* (Emphasis added.)

The following statement was made in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, at page 656:

> "In any case, *even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee* upon the net income of a foreign corporation having a commercial domicile there, cf. *Wheeling Steel Corp. v. Fox*, supra, or *upon net income derived from within the state, Shaffer v. Carter*, 252 U.S. 37, 57; *Wisconsin v. Minnesota Mining Co.*, 311 U.S. 452; cf. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, *is not prohibited by the commerce clause* on which alone taxpayer relies. *U. S. Glue Co. v. Oak Creek*, 247 U.S. 321; *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 119-20; cf. *Bass, Ratcliff and Gretton, Ltd. v. Tax Comm'n*, 266 U.S. 271; *Western Live Stock v. Bureau*, 303 U.S. 250, 255. * * *" (Emphasis added.)

In another case involving the Memphis Natural Gas Co., the Supreme Court of Mississippi upheld a state tax imposed on *net income* of the corporation *derived exclusively from interstate commerce. State Tax Commission v. Memphis Natural Gas Co.*, 197 Miss. 583, 19 So. 2d 477 (1944). *This Court dismissed the taxpayer's appeal for want of a substantial federal question. Memphis Natural Gas Co. v. State Tax Com.*, 323 U.S. 682 (1945).

West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861 (1946), was decided by the Supreme Court of California on the basis that although the taxpayer was engaged exclusively in interstate commerce, a tax on net income derived from California did not violate either the commerce clause or due process clause of the Constitution. Significantly, in its *per curiam* opinion affirming the decision of the Supreme Court of California (328 U.S. 823), this Court not only cited *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, but cited to the page (page 656) of the opinion wherein this

Court had said that a nondiscriminatory tax on net income derived from within the taxing state by a taxpayer engaged wholly in interstate commerce is not prohibited by the commerce clause.

Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) does not indicate that a state may not tax net income derived exclusively from interstate commerce. That case is but another one of a long established line of cases holding that a state may not impose a tax on the privilege of engaging in interstate commerce. The Court based its opinion clearly and precisely on the ground that the tax involved in the *Spector Motor* case was invalid because it was imposed on the privilege of engaging in interstate commerce.

The Court emphasized that the legal incidence of the tax was of conclusive importance in determining whether it violated the commerce clause. In referring to the state court's characterization of the tax as a "tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state," this Court said (page 605):

> "• • • The all-important 'operating incidence' of the tax is thus made clear • • •"

The Court further stated (page 608):

> "• • • The incidence of the tax provides the answer • • •"

It was forcefully stated in the *Spector Motor* case that the validity of a tax depended upon the channel through which it was sought to be collected.

> "• • • Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. • • •." (page 608)

Since the subject of the tax was the privilege of engaging in interstate commerce, the tax was struck down as violating the commerce clause.

The Court recognized that through other channels interstate commerce could be required to pay its fair share of state taxes. Thus, the opinion states (page 609):

> "• • • The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

The tax now before this Court is of this nature. Unlike the tax in the *Spector Motor* case, this is not a tax on the privilege of engaging in interstate commerce. It is a tax on net income. This Court traditionally has regarded taxes on net income from interstate commerce as valid for reasons similar to those for which it has upheld property taxes on instrumentalities moving in interstate commerce. This is apparent from the consistent pattern which the Court has followed in linking taxes on income with taxes on property in discussions of permissible methods of taxation. Illustrations of this pattern may be found in the italicized parts of the quotations from the *Murdock* and *Alpha Portland Cement* cases appearing earlier in this brief.

In footnote 6 of *Spector Motor Service v. O'Connor*, 340 U.S. 602, 609 (1951), the statement in *Memphis Natural Gas Co. v. Beeler* (315 U.S. 649, 656) above referred to was said to be unnecessary to the decision in the case. The footnote presumably was inserted to negative any suggestion that support might be found in the *Memphis Natural Gas* case

(a case involving an excise tax) for the contention that a tax could be imposed on the privilege of carrying on a business that was exclusively interstate in character provided the tax was measured by net income.

The validity of a tax on net income derived exclusively from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, was not attacked in the briefs in the *Spector Motor* case, nor considered in either the majority or dissenting opinion, since the issue was not involved. The brief on behalf of *Spector Motor* stressed that the tax there involved was a privilege tax, not an income tax. Far from attacking the validity of a tax on net income, it expressly recognized the acceptability of a tax on net income from interstate commerce as distinguished from a tax on the privilege of engaging in interstate commerce. (See Appellant's brief in the *Spector Motor* case, pages 10, 11, 17-19). The *Spector Motor* opinion concerned solely the validity of a franchise tax imposed for the privilege of doing business and did not purport to determine the validity of a tax on net income.

Considerations applicable to a tax on net income from interstate commerce are, as we have seen, in many respects comparable to a property tax on instrumentalities moving in interstate commerce such as railroads, barges and airplanes. The policy is said to be that a property tax is valid if there is apportionment. *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590 (1954); *Standard Oil Co. v. Peck*, 342 U.S. 382, 383 (1952); *Ott v. Mississippi Barge Line Co.*, 336 U.S. 169, 174 (1949); *Johnson Oil Co. v. Oklahoma*, 290 U.S. 158, 161-162 (1933).

The problem here simply is not the same as in the case of a privilege tax which involves a tax for the enjoyment of a right granted by the Federal Constitution. The opinion

of the Supreme Court of California in the *West Publishing Co.* case, 27 Cal. 2d 705, 166 P.2d 861 (1946), contains an excellent analysis of the opinions of this Court relating to the distinction for purposes of the commerce clause between a privilege tax and a tax on income or on property.

We respectfully submit that the upholding of the net income tax here involved would be wholly in accord with the approach this Court has consistently taken with respect to apportioned property taxes on instrumentalities used in interstate commerce and taxes on apportioned net income from interstate commerce.

III. Due Process Is Satisfied by a Nondiscriminatory Tax on Fairly Apportioned Net Income.

There is no due process objection to the taxation of income earned from business activities conducted within the taxing state even though the activities constitute exclusively interstate commerce. Apportionment is designed to ascertain the net income reasonably attributable to the activities in the taxing state. *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509. If a tax on net income is nondiscriminatory and fairly apportioned any argument of violation of due process is at an end. *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Memphis Natural Gas Co. v. State Tax Commission*, 323 U.S. 682 (1945); *Butler Bros. v. McColgan*, 315 U.S. 501, 506-507, 509 (1942). Cf. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

CONCLUSION

We respectfully submit that the tax here involved is valid and that the judgment of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted,

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No. 12

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IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,
Respondent

v.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,
Appellant

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

No. 12 October Term, 1958

State of Minnesota,

Respondent

v.

Northwestern States Portland Cement Company,

Appellant

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

This brief as amicus curiae is submitted by the Commonwealth of Pennsylvania, sponsored by the Attorney General, Thomas D. McBride, in accordance with the authority provided in Rule 42 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 250 Minn. 32, 84 N.W. 2d 373. For a copy of the said opinion, dissenting opinions and judgment (R. pp. 2-21 et seq.).

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 10, 1957 (R. 297, f. 3; R. 298, f. 1) following the decision of that court sustaining the validity of the tax in question. A timely petition for re-argument was filed by appellant on July 25, 1957 (R. 276, f. 280) and was denied by the Minnesota Supreme Court on August 28, 1957 (R. 297, f. 297). Notice of appeal was filed by appellant in the Supreme Court of Minnesota on September 12, 1957 (R. 298, f. 299).

Jurisdiction of the court is invoked under 28 U. S. Code, 1257 (2) and 2101 (c) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court violates the due process clause of the U. S. Const. Amend. XIV, s. 1 and commerce clause, U. S. Const. Art. 1, s. 8, cl. 3.

Probable jurisdiction was noted January 6, 1958 (R. 304, f. 309).

QUESTION PRESENTED

Does a state statute which involves a tax upon income derived from and fairly apportioned according to taxpayers' activities within the taxing state violate either the Commerce Clause or the Due Process Clause of the Federal Constitution when assessed against a foreign corporation engaged in interstate commerce, which corporation regularly and continuously engages in income-producing activities within the taxing state?

STATUTES INVOLVED

The tax in question was levied under Minnesota statutes, s. 290.03.

STATEMENT OF INTEREST

The Pennsylvania Corporation Income Tax Law of August 24, 1951, P. L. 1417, as reenacted and amended, 72 P.S. §3420n-1, imposes a property tax upon the net income of all corporations carrying on activities within the Commonwealth or owning property therein derived from sources within the Commonwealth in the following language:

> "§3420n-3. Imposition of tax
>
> "Every corporation carrying on activities in this Commonwealth or owning property in this Commonwealth by or in the name of itself or any person, partnership, joint-stock association or corporation shall be subject to and shall pay a State property tax on net income derived from sources within this Commonwealth at the rate of five per centum per annum upon each dollar of such net income received by and accruing to such corporation during the calendar years . . . ."
>
> "§3420n-2. Definitions
>
> . . . . . .
>
> " 'Sources within this Commonwealth' includes tangible or intangible property located or having

a situs in this Commonwealth, and any activities carried on in this Commonwealth, regardless of whether carried on in intrastate, interstate or foreign commerce.

"'Carrying on activities' shall include every act, power or privilege exercised or enjoyed in this Commonwealth as an incident to, or by virtue of, the powers and privileges acquired by the nature of the corporate organization."

The act provides a formula for the apportionment of income to the Commonwealth of Pennsylvania based upon the average of three fractions; the numerator of the first fraction is the value of the corporation's tangible property situated within the Commonwealth, and the denominator is the value of all the corporation's property wherever situated; the numerator of the second fraction is the expenditure of the corporation for wages, salaries, commissions, and other compensation to its employees assignable to the Commonwealth, and the denominator is the total expenditure of the corporation for wages, salaries, commissions and other compensation of all its employees; the numerator of the third fraction is the amount of the taxpayers' gross receipts from property and activities assignable to the Commonwealth, and the denominator is the amount of the taxpayers' gross receipts from all its property and activities.

The act defines "net income" of the corporation as income returned to and ascertained by the Federal government for Federal income tax purposes.

Thus it appears that the Pennsylvania statute imposes a tax on the income of corporations derived

from sources within the Commonwealth in essentially the identical language of the Minnesota statute under consideration in this case.

The Pennsylvania statute was considered by the Supreme Court of Pennsylvania in the cases of *Roy Stone Transfer Corporation v. Messner et al.*, 377 Pa. 234 (1954), and *Commonwealth of Pennsylvania v. Eastman Kodak Company*, 385 Pa. 607 (1956), cert. denied; 352 U. S. 952 (1956). In both said cases the Supreme Court of Pennsylvania concluded that the act as applied to the particular corporations involved violated the Commerce Clause of the Federal Constitution. The Supreme Court of Pennsylvania held that income derived from the use of locally situated property in income-producing activities is not subject to State taxation if the using corporation is engaged exclusively in interstate commerce, even though said property has a permanent legal situs in the taxing state. It held further that income derived from the solicitation of business by a corporation engaged in interstate commerce is never subject to state taxation regardless of the regularity and continuity of such solicitation, the extent and volume thereof, the number of persons engaged therein, and the volume of business produced thereby. The effect of the Pennsylvania Supreme Court's opinions is to immunize from State taxation the income of any corporation engaged in interstate commerce so long as any part of its activity within the taxing state involves the solicitation of interstate business.

The decisions of the Supreme Court of Pennsylvania in the above cases demonstrates the confusion that exists in the opinions of the courts and the un-

certainty and bewilderment of most judges in approaching the subject of taxable local activities in interstate commerce. It further demonstrates the insoluble problems confronting the executive, legislative and judicial department of every state, in connection with defining and enforcing a state fiscal system which will conform with the conflicting standards of the various decisions of the Supreme Court of the United States.

At the present time there are two cases pending before the Supreme Court of Pennsylvania involving the identical questions presented in the instant appeal. Argument of such cases has been continued by the Supreme Court of Pennsylvania until after the rendition of the appeal of your Honorable Court in the instant case.

It is submitted that there is a clear necessity for the enunciation of a precise definition of the terms "local activities in interstate commerce" or "local incidents of interstate commerce". Likewise the executive and legislative branches of the various state governments require a guide from your Honorable Courts, so that they may be informed regarding the validity of existing and proposed tax legislation. The resolution of these problems by your Honorable Court will end the confusion of the state courts on this subject and the present uncertainty as to the legality of state tax laws affecting interstate commerce.

SUMMARY OF ARGUMENT

I.

The Supreme Court of the United States has held that income derived from interstate commerce may be subjected to a state privilege or property tax so long as it is properly apportioned to activities within the taxing state; that income produced by local activities or the local ownership of property by corporations engaged exclusively in interstate commerce may be subject to state taxation.

II.

The regular, continuous and systematic solicitation of orders in a state by salesmen of a corporation engaged in interstate commerce, resulting in a continuous flow of the corporation's products into the state, constitutes the doing of business in the state sufficient to subject the income produced by such activities to state taxation.

III.

The only instances in which the Supreme Court of the United States has stricken down statutes imposing taxes upon corporations engaged in interstate commerce are where the sole activities of such corporations was the loading or delivery of property or passengers in interstate commerce. In all other cases taxes on corporations engaging in interstate commerce have been sustained so long as the tax was not imposed upon the privilege of engaging in interstate commerce. Where the incidence of the tax is not upon such privilege it conforms with constitutional requirements.

ARGUMENT

Basic Principles Affecting Taxation of Income of Interstate Corporations

The Commonwealth of Pennsylvania adopts the brief of the State of Minnesota, Respondent, and in addition thereto submits the following:

1. Income derived from interstate commerce may be subjected to state taxation so long as it is properly apportioned to activities within the taxing state. *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918); *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321 (1918); *Atlantic Coast Line R. Co. v. Doughton*, 262 U. S. 413 (1923); *Basso, Ratcliff & Gretton, Ltd. v. Tax Commission*, 266 U. S. 271 (1924).

2. Income produced by local activities or the local ownership of property by corporations engaged exclusively in interstate commerce may be subjected to state taxation. *West Publishing Company v. McColgan*, 328 U. S. 823 (1946); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649 (1942).

In the *West Publishing Company* case, the California Supreme Court defined the right of the state to tax such income in language which was approved by the Supreme Court of the United States. At 27 Cal. 705, at page 708, it is stated:

> "• • • plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in

interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. (citing cases) * * * A state 'may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden. United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, supra. * * * ' Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. Memphis Natural Gas Co. v. State Tax Comm., 323 U. S. 682, 65 S. Ct. 440; Id., Miss., 19 So. 2d 477; Parke, Davis & Co. v. Cook, 323 U. S. 681, 65 S. Ct. 436; Id., 198 Ga. 457, 31 S.E. 2d 728, 156 A.L.R. 1360."

3. The tax imposed in connection with local activities of corporations engaged in interstate commerce may be either a property or a privilege tax so long as it is not imposed upon the privilege of engaging in interstate commerce. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80 (1948) (franchise tax); *West Publishing Company v. McColgan*, supra (property tax); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602 (1951); *McGoldrick, Comptroller of The City of New York v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) (excise tax); *Western Live Stock et al. v. Bureau of Revenue et al.*, 303 U. S. 250 (1938) (privilege tax).

This entire matter was summarized by the Court in *Underwood Typewriter Company v. Chamberlain*, 254 U. S. 113 (1920), wherein Mr. Justice Brandeis said at page 119:

> "• • • Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

4. The presence of property within a state or the performance of other activities therein by a corporation engaged exclusively in interstate commerce, if carried on regularly and continuously amounts to the doing of a local business subjecting the corporation to local taxation. *Nippert v. City of Richmond*, 327 U. S. 416 (1946); *Braniff Airways, Inc. v. Nebraska State Board*, 347 U. S. 590, (1954); *Western Live Stock et al. v. Bureau of Revenue et al.*, supra.

The foregoing propositions made one principle crystal clear. A state tax on the income of a corporation derived from local activities in interstate commerce, if properly apportioned by means of allocation fractions which assign a fair proportion of the corporation's income to the taxing state does not burden interstate commerce.

This case does not involve any question with respect to due process, the fairness of the allocation fractions, multiple taxation or any other objection which would cause it to violate the Federal Constitution. It imposes a tax in practically the same language as that used in *West Publishing Company v. McColgan*, supra.

Solicitation of Business Taxable as a Local Activity

The decisions of the Supreme Court of the United States with respect to the taxability of solicitation of business in interstate commerce are confined to those cases where an attempt has been made to impose a tax upon the *privilege* of coming into a state irregularly and spasmodically for the purpose of soliciting interstate business. Therein, the Court has clearly distinguished that situation from the case where solicitation is so regular and continuous as to justify the conclusion that the solicitation is a permanent part of a continuing business. For example, where the only activity within the State of Iowa was the regular and continuous solicitation of orders by a salesman from a corporation's headquarters in Minnesota, which orders were taken subject to acceptance in Minnesota, it was held that a use tax with the requirement that the corporation collect the tax and pay it to the state did not violate the Federal Constitution. *General Trading Company v. State Tax Commission of the State of Iowa*, 322 U. S. 335 (1944).

In *Miller Brothers Company v. Maryland*, 347 U. S. 340 (1954), where the State of Maryland attempted to attach the motor vehicles of a corporation making deliveries within a state on purchases made in another state, Mr. Justice Jackson in denying the right of the State made the following significant statement at page 346:

> "The nearest support for Maryland's position is General Trading Co. v. State Tax Comm'n, 322

U. S. 335. * * * That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers, the only nonlocal phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. * * *"

The fact that regular and continuous solicitation of business alone is sufficient to bring a corporation within a taxing state is further illustrated by the case of *International Shoe Company v. Washington*, 326 U. S. 310 (1945), wherein the question involved was the liability of a corporation, engaged only in the solicitation of interstate business in the State of Washington, for State Unemployment Compensation Taxes, and in proceedings in that State to recover Unemployment Compensation Tax payments. We quote from the opinion, at page 314:

"The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing

business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. International Harvester Co. v. Kentucky, 234 U. S. 579, 587; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87; Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate interstate commerce and did not impose a prohibited burden on such commerce."

The statement of the Court at page 317 is most significant:

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. * * *"

Likewise, the statement at page 321:

> "* * * The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax. * * *"

Even in the leading case of *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), where the immunity of drummers to state taxation was enunciated, the Court clearly indicated that its conclusion applied only to drummers who came into a state for a temporary purpose, and not to those who were engaged in a regular and continuous course of business. Mr. Justice Bradley stated at page 493:

> "* * * But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; * * *"

An analysis of all the cases denying to the states the authority to impose a tax upon the solicitation of interstate business beginning with *Robbins v. Shelby County Taxing District*, supra, down to the present time discloses that each case dealt with a statute or ordinance imposing a license fee or a direct tax upon the privilege of soliciting business in interstate commerce. No case was concerned with the liability for state taxation of a corporation engaged in such activity where the tax was not upon the privilege of soliciting business or upon the privilege of engaging in the interstate commerce itself. These cases clearly illustrate that the facts in the present case do not establish a "drummer case".

The foregoing statement is confirmed by the language of Mr. Justice Stone in *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, supra, at page 55 where, in holding that delivery was a sufficient local activity to impose liability for a sales tax upon a corporation engaged in interstate commerce and making delivery in the state through a common carrier, he stated:

> "It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins v. Shelby County Taxing District, 120 U. S. 489, which have held invalid, license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. • • • *It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate,* compare Robbins v. Shelby County Taxing District, supra, with Ficklen v. Shelby County Taxing District, 145 U. S. 1; see Howe Machine Co. v. Gage, supra; Wagner v. Covington, supra; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case." (Emphasis supplied)

The case of *Nippert v. Richmond*, supra, completely answers any argument that this is a drummer case,

and is authority for the imposition of the tax upon this appellant. That case involved an ordinance of the City of Richmond requiring all solicitors, including persons soliciting business in interstate commerce, to obtain a license. The court went to great lengths to distinguish between *International Shoe Company v. Washington*, supra, and *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Co.*, supra, and pointed out that solicitation, when conducted regularly and continuously within a state so as to constitute a course of business, may be doing business just as is the making of delivery. The tax in the *Nippert* case was invalidated because of the fact that the appellee solicited in Richmond a total of only five days; that there was no showing that she intended to return later for the same purpose, and, if so, whether regularly and indefinitely, or only occasionally and spasmodically. The court concluded that continuous and regular solicitation of business within a state, which certainly is borne out by the facts herein, is such a local activity as to justify state taxation. This appellant could not deny that its solicitation and other activities in Minnesota are regular and continuous, and that it intends to carry on these same activities indefinitely in the future. The salaries paid, the value of the property employed, and the gross receipts and profits produced by these activities clearly indicate a substantial, continuous local income producing activity.

In the *Nippert* case the Court made the following significant statement at page 426:

> "* * * we put aside any suggestion that 'solicitation,' when conducted regularly and continuous-

ly within the State, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. * * *

"The sales and the deliveries in the Berwind-White case were regular, continuous and persistent. They constituted a 'course of business'. There was no suggestion, nor any basis in the facts for one, that they were only casual, spasmodic or irregular. * * * There was no showing that, apart from . . . five days, appellant had solicited previously in Richmond, that she intended to return later for the same purpose or, if so, whether regularly and indefinitely or only occasionally and spasmodically."

The Court further pointed out that the tax involved operated only upon out-of-state operators, and was, consequently, discriminatory, and had an exclusionary effect. It also stated that, since this was a municipal tax, the potentialities involved in the enactment of a similar tax by other municipalities within the state were obvious in their cumulative effect. Neither of these objections can be validly asserted here.

In the leading case of *West Publishing Company v. McColgan*, supra, which involved a California tax almost identical with the one under consideration, the major part of the activities conducted by the taxpayer in California was the solicitation of interstate business.

Neither the Minnesota tax nor the Pennsylvania Corporation Income Tax Act taxes the privilege of engag-

ing in interstate commerce, nor do they tax the privilege of performing specific activities hereinbefore enumerated. The tax is upon income produced by these activities in the state, and not elsewhere, income that is fairly apportioned to the state and which, under the Due Process Clause of the Constitution, cannot be taxed elsewhere.

Local Activities of Respondent's Business Realistically Separable from Interstate Commerce

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The appellant is a manufacturing corporation whose business is essentially intrastate. Its primary purpose is the manufacture of its products. Only in connection with the sale and distribution of its manufactured products does it engage in any interstate activity. This is the type of business the purpose and activity of which cannot be characterized as interstate commerce per se.

It is submitted that the only instances in which your Honorable Court has stricken down the taxation of corporations engaged in interstate commerce are where the sole activities of such corporation was the loading or delivery of property or passengers in interstate commerce.

In *Joseph et al. v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), it was held that loading and unloading were essential parts of the transportation itself. Loading and unloading were held to be the beginning and the end of interstate commerce and, therefore, inseparable therefrom.

In *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937), the Court held that interstate commerce ended with delivery so far as the transportation company was concerned and that such delivery was an inseparable and nonlocal incident of interstate commerce. However, in the *Berwind-White*,

case, supra, where a corporation not engaged in interstate transportation was involved it was held that delivery by it was a local incident of interstate commerce.

Likewise, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1953), the right of the State of Texas to impose a tax upon the occupation of taking gas for immediate interstate transportation by an interstate national gas pipe line company was in issue. The Court stated that the taking of gas into a pipe line was the entry of the gas into interstate commerce and involved the principle that taking and unloading by a transportation company are inseparable from the unbroken interstate process. The Court relied upon *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196 (1885), for the proposition that "receiving and landing passengers and freight is incident to their transportation", and concluded that transportation involved the unbroken process of interstate commerce.

At the same term the Court decided *Railway Express Agency, Incorporated v. Commonwealth of Virginia*, 347 U. S. 359 (1953), which involved a tax on express companies upon the gross receipts derived from interstate transportation of property. Mr. Justice Jackson stated at page 368:

> "• • • It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct.

508; Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 74 L. ed. 463, 50 S. Ct. 111."

On the other hand, the regular and continuous solicitation of business, the taking of orders, demonstration and delivery of products are incidents of sales in interstate commerce, but are not inseparable therefrom. The activities of salesmen within a state may give rise to an interstate shipment, loading and delivery, but are not a part of that process. Thus in *Memphis v. Stone*, supra, the maintenance of pipe lines was essential to the transportation of gas flowing through said lines in interstate commerce, but was, nevertheless, a local activity separate and distinct from said transportation.

The fact that interstate transportation and intercourse may be induced by local activities of appellant does not affect the right of the State with respect to taxation. This principle was enunciated in *Western Live Stock v. Bureau of Revenue*, supra, at page 253, where the Court stated: "Nor is taxation of a local business or occupation, which is separate and distinct from the transportation and intercouse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business".

Appellant's argument is based upon the assumption that if interstate commerce cannot be accomplished without the performance of the particular activity,

said activity is inseparable and an integral part thereof, and cannot be taxed. The error of this assumption is self-evident. In *Memphis Natural Gas Co. v. Stone*, supra, the transportation of gas through the State of Mississippi by pipe line could not have been accomplished without the maintenance of said pipe lines. The work done by the employees in Mississippi was essential to that transportation. Likewise, in the *Berwind-White* case, supra, the interstate sale of coal could not be completed without the delivery, which was the subject of the tax. Since delivery in the instant case is made by the vendor engaging in interstate commerce, even though it uses an interstate carrier to make such delivery, it is performing a local activity within Minnesota which, combined with other income producing activities in the state, subjects it to local taxation. In the *West Publishing Company* case, supra, the interstate sale and shipment of books could not have been accomplished without the solicitation of business in California. Nevertheless, these activities which made the interstate commerce possible were held to be of a local nature, and sufficient to justify state taxation.

The activities of appellant corporation constitute such a continuous and regular course of conduct as to combine to form a distinct and separate local activity within Minnesota. The Minnesota Tax as applied to appellant taxes income which is fairly and reasonably apportioned to the State by means of allocation fractions which have been carefully limited so as to make certain that only the income produced by such activities are taxed.

In the instant case the corporation has tangible property permanently situated in Minnesota. It has wages and pay roll in Minnesota payable to employees, some of whom reside therein permanently and devote their entire time to the corporation's activities in Minnesota, its salesmen take orders in Minnesota and it makes delivery of merchandise in that state. If the foregoing activities are not sufficient to bring respondent corporation within Minnesota's taxing power, then it is impossible to envision any situation wherein a state would have the right to tax a corporation engaged exclusively in interstate commerce.

CONCLUSION

It is respectfully submitted that the statute in question properly imposes a state tax upon corporations engaged in interstate commerce. The incidence of the tax is clearly upon income produced by local activities which are realistically separable from the corporation's interstate operation and which, because of their regularity and continuity, have been held to constitute the doing of business within the taxing state. The recognition of the right of the state to impose and collect such a tax from corporations regularly and continuously carrying on income-producing activities within a state, even though such activities are incident to interstate commerce, will finally resolve the present uncertainty and confusion of the state legislatures and courts on this subject.

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NO. 33

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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NO.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

T. V. WILLIAMS, as State Revenue Commissioner of the State of Georgia, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the case of STOCKHAM VALVES AND FITTINGS, INC., vs. T. V. WILLIAMS, as State Revenue Commissioner, on November 8, 1957.

OPINIONS BELOW

The judgment of the Superior Court of Fulton County, Georgia is appended hereto (App. A, *infra*, 24.) The opinion and judgment of the Supreme Court of Georgia are as yet unreported but are appended hereto (App. A, *infra*, 26).

JURISDICTION

The judgment of the Supreme Court of Georgia was dated and entered on November 8, 1957. A rehearing in said judgment was denied by the Supreme Court of Georgia on November 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of state statutes on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTIONS PRESENTED

The questions presented are whether the Georgia statutes which impose a tax, without discrimination, directly upon net income (not a franchise, occupation, privilege or license tax measured by net income), fairly apportioned according to a taxpayer's activities within Georgia, violate either the commerce clause (Article I, Section 8, Clause 3) or the due process clause (Fourteenth Amendment) of the Constitution of the United States, as applied to a foreign corporation which maintained permanently within Georgia a sales service office and sales service employees and which engaged regularly and competitively within Georgia in a variety of sales service activities when all of its sales were consummated at its home office outside Georgia and all of its activities within Georgia were in connection with such sales?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 8, Clause 3 of Article I of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce . . . among the several states . . ."

Section 1 of Amendment XIV of the Constitution of the United States provides:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 92-3102 of the Code of Georgia of 1933[1] provides:

"Rate of taxation of corporations.—Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as defined in Section 92-3113."

Section 92-3113 of the Code of Georgia of 1933[2] provides:

"The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. *Every such corporation shall be deemed to be doing business within this State if it engages with this State in any activities or transactions for the purpose of*

---

[1] Codifying Section 4 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26), as amended and in effect for the taxable years 1952, 1954 and 1955, except that the rate was reduced to four percent for taxable years beginning on or after January 1, 1955.

[2] Codifying Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26) as amended and in effect for the taxable years 1952, 1954 and 1955. Italicized portion was added by 1950 amendment (Ga. Laws 1950, 299, 300-303). For full text including further provisions for allocating and apportioning net income from business done partly within and partly without the State, see Appendix B, infra, 39-43.

financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce . . ."

STATEMENT OF CASE

For the taxable years 1952, 1954 and 1955, the Petitioner, as State Revenue Commissioner of the State of Georgia, assessed and collected as Georgia income taxes, pursuant to the aforesaid Sections 92-3102 and 92-3113, $18.73, $489.48 and $970.10 respectively, from the Respondent. In due time the Respondent filed claims for refund of the aforesaid taxes and these claims were in due course denied by the Petitioner.

Thereafter, in due time, the Respondent filed a suit against the Petitioner to recover the aforesaid taxes. In its petition the Respondent neither disputed the computation of these taxes nor the reasonableness of the apportionment of its net income to Georgia under the statutory apportionment formula prescribed by the further paragraphs of Section 92-3113. It based its right to recover squarely upon the unconstitutionality of Section 92-3102 and 92-3113 under the commerce clause (Article I, Section 8, Clause 3) and the due process clause (Fourteenth Amendment) of the Constitution of the United States as applied to its activity within the State of Georgia, which it characterized as being entirely in interstate commerce and entirely beyond the territorial limits of the State of Georgia. (R. 26-29). These were the only questions of law raised by Respondent's petition.

The case was tried on an agreed stipulation of facts which is lengthy and which is contained in the record before this Court (R. 2-13). Briefly the facts are as follows:

During the tax years in question, Respondent was a Delaware corporation with its principal office and manufacturing plant at Birmingham, Alabama. It was engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale of these products. Purchasers of its products were established local wholesalers and jobbers located in all of the United States. It maintained inventories of its products in established warehouses at Birmingham, Alabama, Philadelphia, Pennsylvania, Chicago, Illinois, Houston, Texas and Vernon, California. It maintained established sales service offices at the above locations and also at Cambridge, Massachusetts, New York, New York, Pittsburgh, Pennsylvania, San Francisco, California, Washington, D. C., Dallas, Texas, St. Louis, Missouri, and Atlanta, Georgia.

The details of Respondent's method of operation using these established sales service offices, and, particularly its sales service activities through its Atlanta office and Atlanta representative, in summary, show that Respondent's activity in and through its Atlanta office and its Atlanta representative was no casual, transitory, spasmodic, travelling-drummer type of activity — they show that Respondent permanently, regularly, and competitively engaged in soliciting business and in many additional activities and services within Georgia, the total purpose and effect of which was to establish, identify, and operate its Atlanta office and its Atlanta representative as local in the same sense

as its competitors who sold comparable products from local inventories in Georgia.

The trial court below found that Respondent, "during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113 . . . that the taxes collected by Defendant from Plaintiff under Code Section 92-3102, being taxes on Plaintiff's net income fairly apportioned according to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of Due Process under the Federal Constitution as alleged by Plaintiff's petition." (R. 14, 15; App. A., *infra*, 24-25).

In its bill of exceptions to the Supreme Court of Georgia, Respondent, in its assignment of error (R. 15-16) reiterated its contention that "the collection of said tax, and the portion of the Georgia Income Tax Statute under which said tax was collected, to wit; the first paragraph of Section 92-3113 of the Georgia Code of 1933, as applied to Plaintiff in Error, under the undisputed facts . . . constitutes a burden on and interference with interstate commerce . . ." and "constitutes the taxation of a foreign corporation measured by transactions conducted and concluded entirely without the territorial limits of the State of Georgia and with respect to which no taxable event occurred in the State of Georgia, which is in violation of the due process clause of the United States Constitution . . .". No other questions of law were assigned by Respondent as error in its bill of exceptions.

The question on appeal to the Supreme Court of

Georgia, as stated by the Court in its majority opinion, was as follows: "The plaintiff contends that all of its activities within the State of Georgia are a part of and inseparable from interstate commerce, and that any income tax assessed against the plaintiff is a direct burden on such commerce and violates the commerce clause of the Federal Constitution . . .; that the fact that the plaintiff maintains one sales service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due process clause of the Federal Constitution . . . No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable, but the plaintiff contends that the State of Georgia is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce." (R. 37, 38; App. A., *infra*, 27-28).

In the headnote of its decision of November 8, 1957, (R. 36; App. A., *infra*. 26-27), the Supreme Court of Georgia (one dissent), ruling upon the aforesaid assignment of error, said: "The Georgia Income Tax Statute (Code, Ann., Supp., Section 92-3113), as applied to the Plaintiff [describing Respondent's activities within the State of Georgia], violates both the commerce and due process clauses of the Federal Constitution." Section 6-1606 of the Code of Georgia requires that the Court's decision be announced by a written synopsis of the points decided, and such synopsis, or headnote, is the only conclusion to which the entire Court is committed and which is at last the authori-

tative expression of the Court as such, *Forrester* v. *Forrester*, 155 Ga. 722, 727.

With respect to the commerce clause issue, the majority opinion appears to hold that any form of state or local taxation, other than property taxation, upon a taxpayer engaged exclusively in interstate commerce is a burden on interstate commerce citing (R. 42-44; App. A., *infra*, 33-35) *LeLoup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888); *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951); *Atlantic Lumber Co.* v. *Massachusetts*, 298 U. S. 553 (1936); and a note to Mr. Justice Reed's dissenting opinion in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662, 677 (1949) and necessarily equating a tax directly upon fairly apportioned income derived exclusively from interstate commerce with a franchise or privilege tax on exclusively interstate commerce measured by fairly apportioned net income.

With respect to the federal due process issue, the majority opinion (R. 45; App. A., *infra*, 35) says: "We are also of the opinion that the income-tax statute here under consideration, as applied to the Plaintiff, violates the due-process clause of the Federal Constitution," and likens the facts of the case to those in *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954).

The majority opinion, in conclusion, (R. 46; App. A, *infra*, 37) says: "We hold, therefore, that as applied to the plaintiff, the Georgia Income Tax Act violates both the commerce and due-process clauses of the Federal Constitution and the trial court erred in rendering judgment against the plaintiff."

Without a doubt, the Supreme Court of Georgia has applied the commerce clause (Article I, Section 8, Clause 3) and the due process clause (Fourteenth Amendment) of the Constitution of the United States to invalidate the Georgia income tax statutes as applied to the Respondent; thus has been raised and decided a substantial federal question.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Supreme Court of Georgia is contrary to the decisions of this Court in *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321 (1918) and *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946).

2. The decision of the Supreme Court of Georgia misapplies the decision of this Court in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).

3. The decision of the Supreme Court of Georgia is in conflict with decisions of the supreme courts of at least six other states on these questions and produces a lack of uniformity in the application of the Constitution of the United States amongst the several states.

4. The decision of the Supreme Court of Georgia, as regards the interstate commerce issue, is contrary to a basic principle of both federal and state income taxation, established by the decision of this Court in *Graves* v. *New York*, 306 U. S. 466 (1939), that a tax on net income is not a direct tax on the source of that income.

5. The decision of the Supreme Court of Georgia, as regards the due process issue, is contrary to the deci-

sions of this Court in *General Trading Co.* v. *State Tax Commissioner*, 322 U. S. 335 (1944) and *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and misapplies the decision of this Court in *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340 (1954).

6. The identical issues involved in the case at bar are involved in a case now before this Court on appeal, namely, *Northwestern States Portland Cement Co.* v. *Minnesota*, Docket No. 606.

7. Twenty-two states of the United States impose direct income taxes as a substantial source of state revenue. The issues involved in the case at bar are not peculiar to Georgia but are of grave concern to all such states.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

1.

The decision of the Supreme Court of Georgia is contrary to the decision of this Court in U. S. Glue v. Town of Oak Creek, 247 U. S. 321 (1918), and West Publishing Co. v. McColgan, 328 U. S. 823 (1946), affirming the decision of the Supreme Court of California, 27 Calif. 2d 705, 166 Pac. 2d 861 (1946).

Whatever question remained after *U. S. Glue*, stemming from the facts that the taxpayer was a domestic corporation and was engaged in considerable local activity, was thoroughly dispelled in *West Publishing* where the taxpayer was a foreign corporation and was engaged within the taxing state in exclusively interstate activity. *U. S. Glue* involved only the interstate commerce question; *West Publishing* used the due pro-

cess principle of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and the interstate commerce principle of *U. S. Glue*, to establish conclusively the net income tax as a constitutional channel whereby interstate commerce can be required to pay a fair share of the state and local tax burden. The amendment of 1950 to Code Section 92-3113 (Ga. Laws 1950, 299) was predicated upon the *West Publishing* decision. The effort of the Supreme Court of Georgia to distinguish these important cases should not be permitted on the basis merely of general statements made in *Freeman* v. *Hewitt*, 329 U. S. 249, 255 (1946), *Alpha Portland Cement Co.* v. *Massachusetts*, 268, U. S. 203, 218 (1925), and *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609 (1951), all pertaining to a type of tax which was clearly distinguished by this Court in *U. S. Glue* and by the Supreme Court of California in *West Publishing* and affirmed by this Court.

2.

The decision of the Supreme Court of Georgia misapplies the decision of this Court in Spector Motor Service v. O'Connor, 340 U. S. 602 (1951).

The *Spector* decision invalidated a state tax upon the privilege of carrying on a business that was exclusively interstate commerce notwithstanding it was fairly apportioned to business done within the taxing state. The Connecticut tax in that case was a franchise or privilege tax measured by net income.

The Georgia tax, under Section 92-3102 supplemented by Section 92-3113, is a tax directly on net income derived from activities within Georgia; it is an income tax like the Federal income tax. There is in-

volved here no trace of camouflage, subterfuge or indirection by mere labels. By its language the Georgia tax applies equally to domestic and foreign corporations; it is not an occupation or franchise tax and does not purport to tax net income derived from property owned or business done outside of Georgia. *Interstate Bond Co.* v. *State Revenue Comm.*, 50 Ga. App. 744, 751 (1934).

Concurrently with this tax, Georgia imposes, under Section 92-2401 (App. B., *infra*, 43), a franchise tax on domestic corporations, and, under Section 92-2403 (App. B., *infra*, 44) a franchise tax on foreign corporations for the privilege of doing business in Georgia. This latter franchise tax, as early as 1923, was declared unconstitutional by the Supreme Court of Georgia as applied to a foreign corporation engaged within Georgia in exclusively interstate commerce. *Dennison Mfg. Co.* v. *Wright*, 156 Ga. 789.

The income tax under Section 92-3102 is not complementary to the franchise taxes under Sections 92-2401 and 92-2403; it is in addition to these franchise taxes. The taxes involved in this action were imposed as income taxes under Section 92-3102 and not as franchise taxes under Section 92-2403. Thus we say that the Georgia tax is a direct net income tax, meaning that it is not by indirection a franchise, occupation, privilege or license tax measured by net income, or intended to complement a franchise, occupation, privilege or license tax otherwise inapplicable to taxpayers engaged exclusively in interstate commerce.

The Supreme Court of Georgia has interpreted the decision of this Court in *Spector* as making the fact of

the exclusively interstate character of the taxpayer's activity the *ratio decidendi* of that decision rather than the conjunction of that fact with the fact that the tax involved was a tax on the privilege of doing business within the taxing state.

Certainly since *Fargo* v. *Michigan*, 121 U. S. 230 (1887) and *Philadelphia & Southern Mail S. Co.* v. *Pennsylvania*, 122 U. S. 326 (1887), a license, occupation, franchise or privilege tax measured by gross receipts from interstate commerce has been deemed a direct tax on interstate commerce. In 1938, in *Western Live Stock* v. *Bureau*, 303 U. S. 250, out of an expressed concern that interstate commerce pay its share of the state and local tax burden, this Court appeared to relax the prohibition against direct taxes on interstate commerce to allow such a tax if it could not be repeated in other states and thereby subject that commerce to multiple burdens. Subsequent decisions of this Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649 (1942) seemed to advance this idea. In *Adams* the opinion used the word "apportionment" as indicating the factor that saved the tax in *Western Live Stock*. After the foregoing decisions it was generally thought that "apportionment" was the cure-all for direct taxes on interstate commerce. This assumption was erroneous, and it is the real substance of the holding in *Spector* that a direct tax on interstate commerce (i. e. a license, occupation, franchise, or privilege tax) cannot be saved by a constructive localization effected by means of even a fair apportionment.

The tax involved in *Memphis Natural Gas* was a

franchise or privilege tax on doing business measured by net income; the dictum of Chief Justice Stone in that case to the effect that even if taxpayer's business were wholly interstate commerce a non-discriminatory tax upon the net income of a foreign corporation derived from within the state is not prohibited by the commerce clause, and citing *U. S. Glue*, was a premature conclusion expressing the development described above. Naturally, this Court in the now-famous footnote 6 of *Spector* had to disavow this dictum, but the disavowal must of necessity be limited to the tax involved in *Memphis Natural Gas* which was, as stated, a franchise or privilege tax measured by net income. It certainly should not be interpreted as superseding the rule of *U. S. Glue* as perfected by *West Publishing*, and we do not believe this Court intended this dictum to have this effect.

3.

The decision of the Supreme Court of Georgia is in conflict with decisions of the supreme courts of at least six other states on these questions and produces a lack of uniformity in the application of the Constitution of the United States amongst the several states.

Before *Spector*, the Supreme Court of New Mexico, in *Humble Pipe Line Co.* v. *New Mexico*, 45 N. Mex. 29, 109 Pac. 2d 247 (1941), followed *U. S. Glue* and rejected *Alpha Portland Cement*, saying, ". . . there is a difference between franchise taxes levied upon corporations because of their activities in interstate commerce and an income tax upon the net income." Likewise, the Supreme Court of Mississippi, in *State Tax Comm.* v. *Memphis Natural Gas Co.*, 197 Miss. 583, 19 Sou. 2d 477 (1944), followed *U. S. Glue*, and this Court

dismissed the taxpayer's appeal for want of a substantial federal question (323 U. S. 682). Reference has already been made to the decision of the Supreme Court of California in *West Publishing Co.* v. *McColgan*, 27 Calif. 2d 705, 166 Pac. 2d 861 (1946), affirmed by this Court (328 U. S. 823), citing *U. S. Glue*.

After *Spector*, the Supreme Court of Oklahoma, in *Southwestern Gas & Elec. Co.* v. *Oklahoma*, 208 Okla. 85, 253 Pac. 2d 549 (1953), following *U. S. Glue* and *West Publishing*, said, "... cases involving a license tax are not comparable to those of the instant case ... the United States Supreme Court distinguishes 'between a tax which is levied for the privilege of engaging in interstate commerce and a tax which is levied upon the net income from such commerce' and holds that net income tax does not conflict with the commerce clause of the Constitution of the United States."

In 1956, the Supreme Court of Louisiana, in *Fontenot* v. *John I. Hay Co.*, 228 La. 1031, 84 Sou. 2d 810, gave special attention to *Spector* in comparison with *U. S. Glue* and *West Publishing* and upheld the tax saying, "the incidence of the present tax is income earned in Louisiana, not the right to transport goods on waters located in Louisiana." And in 1957, the Supreme Court of Minnesota in *Minnesota* v. *Northwestern States Portland Cement Co.*, ... Minn., ... 84 N. W. 2d 373, likewise gave special attention to *Spector* and *Alpha Portland Cement*, in comparison with *West Publishing*, and upheld the tax.

Thus, in New Mexico, Mississippi, California, Oklahoma, Louisiana and Minnesota neither the commerce clause nor the due process clause of the Constitution of

the United States is applied to prohibit a direct income tax (not a license, occupation, franchise or privilege tax) on a foreign corporation doing exclusively interstate commerce. The decision of the Supreme Court of Georgia in this case makes the application of the Constitution of the United States in these respects different from its application in these other states, a situation which this Court ought to rectify and clarify in the interest of uniformity in the application of the Constitution amongst the several states.

4.

The decision of the Supreme Court of Georgia, as regards the interstate commerce issue, is contrary to a basic principle of both federal and state income taxation established by the decision of this Court in Graves v. New York, 306 U. S. 466 (1939), that a tax on net income is not a direct tax on the source of that income.

The relationship between a tax on net income and the source of that income is a very basic problem in the law of income taxation, both federal and state, and is particularly pertinent whenever a source of income is afforded constitutional protection. As this Court said in *Spector*, the "operating incidence" of the tax is "all-important" and "even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." Quite obviously, the direct income tax imposed by Georgia violates the commerce clause *only* if a tax on income is a tax on the source of that income.

This Court in *Graves* said: "The theory, which once

won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." This conclusion required the overruling of *Collector* v. *Day*, 11 Wall. 113 (1871), and gave final effect to a development which began with *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), and was followed in *U. S. Glue*; *Shaffer* v. *Carter*, 252 U. S. 37 (1920); *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413 (1923) and *People, ex rel. Cohn* v. *Graves*, 300 U. S. 308 (1937). Subsequently it has been restated in *Wisconsin* v. *Minnesota M. & M. Co.*, 311 U. S. 452 (1940); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940); *International Harvester Co.* v. *Wisconsin*, 322 U. S. 435 (1944) and *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946).

That a tax on net income is not a tax on the source of that income is a proposition that is a part of the warp and woof of both state and federal income taxation and is by no means limited to the context of interstate commerce. The decision of the Supreme Court of Georgia cannot be permitted to undo the judicial travail this Court has experienced in establishing this basic proposition.

5.

The decision of the Supreme Court of Georgia, as regards the due process issue, is contrary to the decisions of this Court in General Trading Co. v. State Tax Commissioner, 322 U.S. 335 (1944), and International Shoe Co. v. Washington, 326 U. S. 310 (1945), and misapplies the decision of this Court in Miller Bros. Co. v. Maryland, 347 U. S. 340 (1954).

The problem here is the *quality* of the required

"minimum connection between a state, and the person, property, or transaction" of the taxpayer.[3] The Supreme Court of Georgia by its reference to its decision (R. 46; App. A, *infra*, 36-37) in *Redwine* v. *Dan River Mills*, 207 Ga. 381, and *Suttles* v. *Owens-Illinois Glass Co.*, 206 Ga. 849, apparently takes this "minimum connection" to require at least some transactions within the taxing state, such as the contractual consummation of a sale or the actual delivery of goods from inventory, and to ignore other activity, no matter how substantial, which does not culminate within the taxing state in some such transactions. The amendment of 1950 to Section 92-3113 purposely used the term "activities or transactions" in its definition of "doing business" to expand it beyond transactions alone and to exhaust the State's constitutional power to tax on the basis of activities within the State as well as transactions. The effect of the decision of the Supreme Court of Georgia is to say that the due process clause of the Fourteenth Amendment precludes activities other than those culminating in some transaction within the state, from giving jurisdiction to tax and to ignore such activities in deciding whether the state has given any protection, opportunities and benefits for which it can reasonably demand a tax.

Such a concept of the constitutional scope of "doing business" is too narrow. Modern business being what it is, there are many important business activities which involve no contractual transactions and which make substantial contributions to the production of income; many illustrations come to mind: A research

[3] Language of this Court in *Miller Bros.* (p. 345) and quoted by the Supreme Court of Georgia in its opinion in this case (R. 46; App. A, *infra*, 36).

project, an advertising department, a consumer research division, a dealer training program, etc. Any one of these could be carried on within this State with no more than an office and one or a few employees and be a substantial factor in the production of a foreign corporation's income.

This Court has adopted the broader view of the matter. It is significant to note that in *West Publishing* this Court cited *International Shoe* which in turn cited *General Trading Co.*, which in turn cited *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939) and *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, (1941); a review of these cases will show that solicitation and other sales service activities, *conducted on a permanent, regular and competitive basis*, are enough to satisfy due process irrespective of contractual transactions within the taxing state.

The system of established sales service offices and representatives employed by the Respondent in this case was no casual, spasmodic, transitory factor in Respondent's business; it was its permanent, regular and competitive way of doing business generally and within Georgia. Indeed, Respondent's activities within Georgia were very much like the taxpayer's activities in *Northwestern Consolidated Milling Co.* v. *Massachusetts*, 246 U. S. 147, 155 (1918), where a Minnesota corporation, which operated flour mills in Minnesota and sold to wholesale dealers throughout the country, had an office in Massachusetts where it employed several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour, taking orders from them and turning the orders over to the nearest wholesaler for shipment. This Court held that the taxpayer

was doing business in, and subject to tax by, Massachusetts consistently with due process.

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), this Court said "the test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." In *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949), this Court further said "those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state." Permanent, regular and competitive activity within a state establishes the *quality* of the required minimum contacts and a fair apportionment formula reflects the *quantity* of such contacts.

In this day when both state and local governments expend considerable sums of money for industrial development and for services which industry demands, it is reasonable, indeed, that foreign corporations who establish themselves on a permanent and competitive basis within a state be required to contribute to the expenses of those governments on some fair basis. We think the above-cited decisions of this Court have so held, and that the decision of the Supreme Court of Georgia, with its narrower view, is contrary to such holdings.

6.

The case of Northwestern States Portland Cement Co. v. Minnesota,—Minn.—, 84 N. W. 2d 373, recently decided by the Supreme Court of Minnesota and docketed in this Court as No. 606 on appeal, involves the same issues as the case at bar.

In that case the taxpayer was a foreign corporation engaged within Minnesota in exclusively interstate commerce. The tax was a direct income tax (not a franchise or privilege tax measured by net income). Its activities were strikingly the same in Minnesota as the Respondent's in Georgia; there are only two[4] differences: (1) the taxpayer there employed five sales representatives, as compared to one in the case at bar, and (2) the flow of taxpayer's products into Minnesota constituted 48% of its sales volume, as compared to 1-2% in the case at bar. As stated, we believe it is the *quality* of a foreign corporation's contacts within a taxing state that is important under the decisions of this Court and not the *quantity*, since the quantity of its contacts are adequately taken into account by a fair apportionment formula under *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949).

With *Northwestern States Portland Cement Co.* before this Court on appeal, involving the same issues, we ask this Court to grant certiorari in the case at bar and, at least, permit this Petitioner to have the benefit of this Court's disposition of that case.

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[4] There is another difference in that the Minnesota net income tax is a so-called "second structure" tax, meaning that it complements a franchise tax measured by net income in situations where the taxpayer cannot be subjected to the franchise tax. The Georgia income tax is not a "second structure" tax and if this factor is dispositive of the case from Minnesota, then the case at bar is yet a different case concerning the validity of a direct net income tax on exclusively interstate income.

7.

The relationship between the commerce clause and the due process clause of the Fourteenth Amendment and state taxes imposed directly on net income fairly apportioned according to activity within the taxing state are questions of great concern to states which employ direct income taxes as a source of revenue, and, more so, since the decision of this Court in Spector.

Twenty-one states[5] rely upon the net income tax as a method of raising revenue. For forty years, since 1918, the decision of this Court in *U. S. Glue*, supplemented in 1946 by *West Publishing*, has stood in answer to any question about the relationship of an income tax to interstate commerce. Likewise, for thirty-eight years, since 1920, it has been thought that the decision of this Court in *Shaffer* v. *Carter*, 252 U. S. 37, and other well-known decisions on apportionment, such as *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, decided later in the same year, and *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, decided in 1931, have stood in answer to any question about the relationship of an income tax on multi-state income and due process. These states have relied on these decisions.

The dictum of this Court in *Spector* has been seized upon by taxpayers to relitigate these issues and has been used to introduce an element of uncertainty which we respectfully ask this Court to dispel.

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[5] Alabama, Arizona, Arkansas, California, Colorado, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, Virginia and Wisconsin.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

JUDGMENTS AND OPINIONS BELOW

1. Judgment of the Superior Court of Fulton County.

NO. A-55986

In the Superior Court of Fulton County, Georgia

STOCKHAM VALVES & FITTINGS, INC.,
Plaintiff

vs.

T. V. WILLIAMS, as State Revenue Commissioner,
Defendant

This case came on for trial at the July Term, 1957, of this Court. Counsel John Izard, Jr. and W. K. Meadow appeared for plaintiff, and Assistant Attorneys General William L. Norton, Jr., and Ben F. Johnson, Jr., appeared for defendant. A stipulation was filed in which it was agreed that this Court should pass on all issues of law and fact without the intervention of a jury and that the facts set forth therein should be received by the Court as all the evidence in the case. After consideration of the facts as stipulated and after hearing oral argument of Counsel for both parties,

IT IS HEREBY FOUND, ORDERED AND ADJUDGED that plaintiff, during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113, as amended by an Act approved February 16, 1950 (Ga. Laws 1950, pp. 299-303); that the taxes collected by defendant from plain-

tiff under Code Section 92-3102, being taxes on plaintiff's net income fairly apportioned according to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of Due Process under the Federal Constitution, as alleged by plaintiff's petition; that the aforesaid Code Section 92-3113, as specified by plaintiff's petition, is not unconstitutional for any of the reasons assigned in plaintiff's petition; that said taxes were not erroneously or illegally collected by defendant from plaintiff; that plaintiff is not entitled to any recovery against defendant; that judgment be for defendant; and that the costs of the action be cast against plaintiff.

In open Court this 19 day of July, 1957.

/s/ CLAUDE D. SHAW
Judge, Fulton Superior Court

2. Opinion and Judgment of the Supreme Court of Georgia.

Supreme Court of Georgia.

Case No. 19838.

STOCKHAM VALVES & FITTINGS, INC.,

vs.

WILLIAMS, State Revenue Commissioner.
Decided November 8, 1957.

By the Court:

The Georgia Income Tax Statute (Code, Ann. Supp. § 92-3113) as applied to the plaintiff, a non-resident corporation with its home office and manufacturing plant outside of the State of Georgia — which maintained only a sales-service office in this state, which was used as headquarters by one of its sales representatives, who spent about one-third of his time in that office or traveling within this State, and in which office a small amount of office furniture, valued at approximately $1,000, was maintained, and one woman secretary was employed, and where the sales representative carried on the ordinary duties of a salesman in Georgia calling on customers and prospective customers, but no orders were accepted within the State of Georgia, and all sales were made on an "f.o.b. warehouse" basis and were completed at warehouses outside of the state by deliveries to customers or to common carriers consigned to customers — violates both the commerce and due-process clauses of the Federal Constitution (Code §§ 1-125 (3), 1-815), and the

trial court erred in sustaining its validity as against such attacks.

This was an action brought by Stockham Valves & Fittings, Inc. (hereinafter referred to as the plaintiff), against T. V. Williams as Revenue Commissioner of the State of Georgia, to recover income taxes paid by the plaintiff under protest to the state for the calendar years 1952, 1954, and 1955, assessed against the plaintiff under the following Georgia Income Tax Statutes: Code (Ann. Supp.) § 92-3102, which provides that "Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to four percent of the net income from property owned or from business done in Georgia, as defined in section 92-3113"; and Code (Ann. Supp.) § 92-3113, which provides that "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce." Claims for a refund of the taxes paid having been denied by the defendant, the present suit was brought.

The plaintiff contends that all of its activities within the State of Georgia are a part of and inseparable from interstate commerce, and that any income tax assessed

against the plaintiff is a direct burden on such commerce and violates the commerce clause of the Federal Constitution (Code § 1-125 (3)); that the fact that the plaintiff maintains one sales-service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make the plaintiff present in the State in any substantial sense, and an attempt to subject it to an income tax violates the due-process clause of the Federal Constitution (Code § 1-815). No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable; but the plaintiff contends that the state is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce.

The facts were stipulated, and the issue was submitted to the trial judge without a jury; and to the judgment upholding the validity of the statute and the tax the plaintiff excepts.

From the stipulation of facts it appears that the plaintiff is a corporation organized under the laws of Delaware with its principal or home office and its manufacturing plant located in Birmingham, Alabama. Since 1905, and including the tax years in question, it has been engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale and use of valves and pipe fittings which it manufactured. For the tax years in question, it maintained inventories of its products in established warehouses at Birmingham, Ala., Philadelphia, Pa., Chicago, Ill., Houston, Tex., and Vernon, Calif. It maintained estab-

lished sales-service offices at the foregoing locations and also at Cambridge, Mass., New York, N. Y., Atlanta, Ga., Pittsburgh, Pa., San Francisco, Calif., Washington, D. C., Dallas, Tex., and St. Louis, Mo. Purchasers of plaintiff's valves and pipe fittings were located in all the United States.

As a matter of policy and practice, during the tax years in question, the plaintiff made sales only to established local wholesalers and jobbers and (except for sales to makers of automatic-sprinkler systems) made no sales directly to users and installers of valves and pipe fittings. The local wholesalers and jobbers who handled the plaintiff's products, however, were in no way tied in or committed by any type of license, franchise, or other authorized or exclusive dealership arrangements to the distribution of the plaintiff's products. Any established local wholesaler or jobber, having established credit, was considered as a prospective customer and could buy from the plaintiff. Established local wholesalers and jobbers who did buy from the plaintiff were entirely free to discontinue buying from it at any time and for any reason; they were also free to deal in competitive products and usually did handle one or more lines of competing products.

The plaintiff, during the years in question, made no sales on a consignment basis and maintained no inventories of its own at any place except at the aforesaid warehouses, none of which were located in Georgia. Through its sales representative, it encouraged every local wholesaler and jobber who handled its products to carry a local inventory, and to those local wholesalers and jobbers who did maintain a local inventory of valves, it gave a price concession, which was not avail-

able to wholesalers and jobbers who did not. Pipe fittings were, however, sold at uniform prices whether or not carried in inventory.

All orders for the plaintiff's products were contractually accepted or rejected at the home office of the plaintiff in Birmingham, Alabama. No representative of the company at any sales-service office had any authority to, or did, contractually accept or reject any order under any circumstances. Contractural authority was vested exclusively in the home office in Birmingham, Alabama. For the most part, orders were received by mail at the company's home office in Birmingham directly from wholesalers and jobbers. Such orders as were received at sales-service offices, or by the solicitation of sales representatives working out of sales-service offices, were relayed by mail, telephone or teletype to the home office at Birmingham for contractual acceptance or rejection. Some such orders were rejected by the home office for credit or other reasons.

The plaintiff had no plant or warehouse in Georgia. All sales were made on an "f.o.b. warehouse" basis, and were completed at the plant or warehouse by deliveries to customers or to common carriers consigned to customers.

Since 1950, and during the tax years in question, the plaintiff maintained a sales-service office in Atlanta. One of its sales representatives used this office as his headquarters. He worked in a territory which included Georgia, North Carolina, South Carolina, and parts of Tennessee and Virginia. Part of Florida was also included in his territory until 1954. This representative spent approximately one-third of his time at the At-

lanta sales office or traveling in the State of Georgia. The other two-thirds of his time was spent traveling outside of Georgia. He was paid a salary plus a commission on the amount of business derived from the territory served by the Atlanta office.

The plaintiff also employed at its sales-service office in Atlanta a full-time woman secretary. She functioned on the basis of her own knowledge and experience and literature furnished by the company as a source of information concerning the plaintiff's products. She performed stenographic and clerical duties and facilitated communications between the plaintiff's home office in Birmingham, the plaintiff's sales representative when he was out in the territory, and customers, prospective customers, contractors, and users of the plaintiff's products. She operated the teletype machine and sometimes obtained information from Birmingham to give to architects, engineers, or other people interested in the plaintiff's products.

The Atlanta sales-service office was listed in the Atlanta telephone directories in the plaintiff's name in both the alphabetical and classified business listings. The office was listed in the plaintiff's name in the Atlanta city directories. The company, on its sales-service office letterheads, in its catalogues and discount sheets, and on some promotional material, listed the fact that it maintained a sales-service office in Atlanta. A small amount of office furniture was maintained there of the approximate value of $1,000. The representative carried on the ordinary duties of a salesman in Georgia. No orders were, however, accepted within the State of Georgia. All sales were completed at warehouses outside of the State by deliveries to customers

or to common carriers consigned to customers. All such sales took place outside of Georgia.

At no time during the tax years in question did the plaintiff qualify to do business within the State of Georgia; no officers or director of the plaintiff was a resident of Georgia; the Atlanta sales representative was a resident of the State. During the tax years in question, rent, salaries, and all other expenses of the Atlanta office were paid by check drawn by officers located at the home office on bank accounts of the company in banks outside the State of Georgia. No employee of the plaintiff in Georgia had authority, either alone or with any other person, to draw checks upon or make withdrawals from any bank account of the company. Expense accounts of employees at the Atlanta office were forwarded to the home office, where they were reviewed and paid by checks. The plaintiff kept no bank account in the State of Georgia. All credit matters were handled at the plaintiff's Alabama office, where credit information was obtained and all credit questions were passed on. All invoices were prepared and mailed from and all collections were made by the plaintiff's office in Alabama. No employee of the plaintiff in Georgia had authority to accept nor did any employee accept any order, bind plaintiff to furnish goods, arrange credit terms, or make collections.

Hawkins, Justice. (After stating the foregoing facts.) That the decision of the questions here presented is not without difficulty, is pointed out by the Supreme Court of the United States in the recent decision in Freeman v. Hewit, 327 U. S. 249, 252, (67 Sup. Ct. 274, 91 L. ed. 265), where it is said: "The history of this problem is spread over hundreds of volumes of ou

Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." In LeLoup v. Port of Mobile, 127 U. S. 640, 648 (8 Sup. Ct. 1380, 32 L. ed. 311), the Supreme Court stated the fundamental limitations of the commerce clause on state taxation as follows: "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." In Forrester v. Culpepper, 194 Ga. 744, 748 (22 S. E. 2d 595), this court quoted with approval from Interstate Bond Co. v. State Revenue Com., 50 Ga. App. 744, 751 (179 S. E. 559), the following: "The general view is that an income tax is not a property tax, but more in the nature of an excise tax." In Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), a Massachusetts excise tax, based on the proportion of a company's assets employed in the state and the proportion of its net income derived in the State, was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. The taxpayer maintained a branch sales office in Massachusetts, which was used as headquarters by its traveling salesmen. It owned office equipment there, and its local manager handled petty cash items for the company through a bank account maintained

in his own name. The court found that all of the taxpayer's activities were an integral part of interstate commerce, and therefore held the excise unconstitutional. The court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the state." In Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), it is said: "This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

From the foregoing statement of facts it appears without dispute that the plaintiff was engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned; and in Atlantic Lumber Co. v. Commissioner of Corporations and Taxation of Massachusetts, 298 U. S. 553, 555 (56 Sup. Ct. 887, 80 L. ed. 1328), it was held: "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

Counsel for the defendant contend that a tax on

net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce; but, as previously pointed out, we have held that an income tax is in the nature of an excise tax, and in the footnote added to the dissenting opinion written by Mr. Justice Reed in Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 677 (69 Sup. Ct. 1264, 93 L. ed 1613), it is said: "Since we perceive no difference for the purposes of this case between franchise, privilege, and excise taxes, insofar as they are exacted for the privilege of doing or the doing of interstate business, we have treated them as identical as far as their validity under the commerce clause is concerned. In Ozark and Anglo-Chilean Nitrate the taxes were called franchise taxes; In Alpha it was labeled an excise tax." In Dennison Mfg. Co. v. Wright, 156 Ga. 789 (3-b) (120 S. E. 120), this court held: "Where a foreign corporation rents and maintains an office in this State, with a stock of samples and a force of office employees and traveling salesmen, merely to obtain orders in this State and other States, subject to approval by its home office, for its goods to be shipped directly to its customers from its home State, such an arrangement is part of its interstate commerce, and not subject to a local excise tax."

We are also of the opinion that the income-tax statute here under consideration, as applied to the plaintiff, violates the due-process clause of the Federal Constitution. We take it that no one will question the fact that a state may not tax activities carried on outside its borders without violating this provision of the Constitution. The question in every case is whether such a connection exists between a business and the taxing state as to permit the imposition of a general income

tax on a portion of the net income of the business; and in Wisconsin v J. C. Penney Co., 311 U. S. 435, 444 (61 Sup. Ct. 246, 85 L. ed. 267), the Supreme Court said: "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." See also Miller Brothers Co. v. Maryland, 347 U. S. 340, 344 (74 Sup. Ct. 535, 98 L. ed. 744), where the foregoing rule was applied to facts quite similar to those in the instant case. There the court said: "The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." After referring to its previous decisions, that court said: "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This court, in Redwine v. Dan River Mills, 207 Ga. 381 (61 S. E. 2d 771), held that activities more extensive than those carried on by the plaintiff did not constitute "doing business" within the meaning of the in-

come-tax act then in effect; and in Suttles v. Owens-Illinois Glass Co., 206 Ga. 849 (59 S. E. 2d 392), it was held that accounts growing out of similar activities in Georgia did not have a tax situs in Georgia. See also Norton Co. v. Department of Revenue of Illinois, 340 U. S. 534 (71 Sup. Ct. 377, 95 L. ed. 517).

We hold, therefore, that as applied to the plaintiff the Georgia Income Tax Act violates both the commerce and due-process clauses of the Federal Constitution, and the trial court erred in rendering judgment against the plaintiff. The cases mainly relied upon by the defendant, namely, U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321 (38 Sup. Ct. 499, 62 L. ed. 1135); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (41 Sup. Ct. 45, 65 L. ed. 165); Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413 (43 Sup. Ct. 620, 67 L. ed. 1051); Memphis Natural Gas Co. v. Beeler, 315 U. S. 649 (62 Sup. Ct. 857, 86 L. ed. 1090); West Publishing Co. v. McColgan, 27 Cal. 2d 705 (166 Pac. 2d 861), and others, are clearly distinguishable on their facts. In those cases the taxpayers were either residents of the taxing State, or were carrying on within the State extensive intrastate as well as interstate business, or else the statements therein made which would seem to conflict with the rulings here made were obiter. In Freeman v. Hewit, 329 U. S. 249, 255 (67 Sup. Ct. 274, 91 L. ed. 265), the Supreme Court of the United States recognized that the taxing power permitted by the U. S. Glue Company case, supra, was applicable only to residents of a State. It was said: "It (a State) can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." The Underwood Typewriter decision, supra, was explained and limited in Alpha Port-

land Cement Co. v. Massachusetts, 268 U. S. 203, 218 (45 Sup. Ct. 477, 69 L. ed. 916, 44 A. L. R. 1219), where the court said: "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles." The dictum in the Beeler case, supra, was expressly disapproved as such by the Supreme Court in Spector Motor Service v. O'Connor, 340 U. S. 602, 609 (71 Sup. Ct. 508, 95 L. ed. 573), in the following language: "Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As already pointed out by the United States Supreme Court, its decisions dealing with the problem here presented are spread through hundreds of volumes of its reports, and all of its pronouncements are not consistent or reconcilable. To attempt to harmonize all that has been said, would neither clarify what has gone before nor guide the future, and to undertake here to point out the distinguishing features of each of the numerous decisions would only consume unnecessary time and space.

Judgment reversed. All the Justices concur except Head, J., who dissents.

APPENDIX B

STATUTORY PROVISIONS

1. **Section 92-3113 of the Code of Georgia of 1933,** the same being also Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., pp. 24, 34-36), as amended (Ga. Laws 1950, pp. 299, 300-303) and in effect during the years involved in this case:

Corporations, allocation and apportionment of income.—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce.

If the entire business income of the corporation is derived from property owned or business done in this State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on that portion of the business income which is reasonably attributable to the property owned and business done within the State, to be determined as follows:

(1) Interest received on bonds held for investment and income received from other intangible property held for investment are not subject to

apportionment. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are also not subject to apportionment. All expenses connected with the interest and rentals realized from such investments are likewise not subject to apportionment but must be applied against the investment income. The net investment income from intangible property shall be allocated to Georgia if the situs of the corporation is in Georgia or the intangible property was acquired as income from property held in Georgia, or as a result of business done in Georgia. The net investment income from tangible property located in Georgia shall be allocated to Georgia.

(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation nor for sale in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State, or intangible property having an actual situs or a business situs within the State. Otherwise such gains shall be allocated outside the State.

(3) Net income of the above classes having been separately allocated and deducted, the remainder of the net business income shall be apportioned as follows: Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax should be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such

sources: Provided, that the taxable situs of intangible property held or owned by any domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

(4) Where income is derived from the manufacture, production, or sale of tangible personal property, the portion of the net income therefrom attributable to property owned or business done within this State shall be taken to be the portion arrived at by application of the following:

Three Factor Ratio

(a) **Average inventory ratio.**—The ratio of the average of the monthly inventories of all products held in this State for sale, lease or other distribution or use in connection with the trade or business of the taxpayer during the taxable year to the average of the total monthly inventories of all products held everywhere for sale, lease or other distribution in connection with the trade or business of the taxpayer. The term 'products' shall include goods, wares and merchandise of every character and kind, whether owned by the taxpayer or held on consignment or otherwise, but shall not include unrecovered or unextracted natural resources, raw materials, or goods in process of manufacture.

If the taxpayer shall fail to keep its records so as to disclose the information necessary to apply the foregoing ratio, the Commissioner shall determine the same from such information as may be available.

(b) **Salaries and wages ratio.**—The ratio of all

salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in this State for services performed in connection with the trade or business of the taxpayer during the taxable year to the total salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in connection with its entire trade or business, wherever conducted, during the taxable year. For the purposes of this section, all salaries, wages, commissions and other compensation paid to residents of Georgia shall be deemed to have been paid or incurred in this State, irrespective of the place of actual payment.

(c) **Gross receipts ratio.**—The ratio of gross receipts from business done within this State to total gross receipts from business done everywhere. For the purposes of this section receipts shall be deemed to have been derived from business done within this State only if received from products shipped to customers in this State, or delivered within this State to customers, and in determining the gross receipts within Georgia, receipts from sales negotiated or effected through offices of the taxpayer outside the State and delivered from storage in the State to customers outside the State shall be excluded.

(d) The average inventory ratio, the salaries and wages ratio, and the gross receipts ratio shall be separately determined and the three percentages averaged, and the net income of the corporation allocated and apportioned to Georgia according to such average.

(e) For the purposes of this section, the word 'sale' shall include exchange, and the word 'manufacture' shall include the extraction and recovery of natural resources and all processes of fabricating and curing.

(5) Where income is derived from business

other than the manufacture, production or sale of tangible personal property, or from the holding or sale of intangible property, the net income shall be equitably apportioned within and without the State under rules and regulations of the State Revenue Commissioner, in the ratio that the business within the State is to the total business of the corporation.

(6) The net income of a domestic or foreign corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value, and by including fair compensation to such domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining such net income the Commissioner may equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof.

2. **Section 92-2401 of the Code of Georgia of 1933,** the same being also Paragraph 43 of Section 1 of the General Tax Act of 1935 (Ga. Laws 1935, pp. 11, 25), as amended (Ga. Laws 1951, pp. 157, 167; 1952, pp. 371, 372) and in effect during the years involved in this case:

Corporations, domestic and domesticated foreign.—All corporations incorporated under the laws of Georgia, except those that are not organized for pecuniary gain or profit, and domesticated foreign corporations, in addition to all other taxes now required by them by law, are hereby required to pay each year an annual license or occupation tax as specified in the following scale: . . .

3. **Section 92-2403 of the Code of Georgia of 1933,** the same being also Paragraph 44 of Section 1 of the General Tax Act of 1935 (Ga. Laws 1935, pp. 11, 28) and in effect during the years involved in this case:

> **Foreign corporations.**—All corporations incorporated or organized under the laws of any other State, Territory, or Nation, doing business or owning property in this State, except those not operated for pecuniary gain or profit, in addition to all other taxes now required of them by law, are hereby required to pay each year an annual license or occupation tax for the privilege of carrying on their businesses within this State, as specified in the following scale: . . .

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

T. V. WILLIAMS as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES AND FITTINGS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR THE PETITIONER.

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No. 763.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

T. V. WILLIAMS as State Revenue Commissioner,
Petitioner,

vs.

STOCKHAM VALVES AND FITTINGS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion and judgment of the Supreme Court of Georgia (R. 28-38) is reported in 213 Ga. 713, 101 S. E. 2d 197.

JURISDICTION.

The judgment of the Supreme Court of Georgia was entered on November 8, 1957, and a rehearing was denied on November 26, 1957. The petition for a writ of certiorari was filed in this Court on February 3, 1958, and the order granting certiorari was entered on March 17, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) since the validity of state statutes on grounds of repugnancy to the Constitution of the United States is drawn in question.

QUESTIONS PRESENTED.

The questions presented are whether the Georgia statutes which impose a general tax, without discrimination, directly upon net income (not a franchise, occupation, privilege or license tax measured by net income), fairly apportioned according to a taxpayer's activities within Georgia, violate either the commerce clause (Article I, Section 8, Clause 3) or the due process clause (Fourteenth Amendment) of the Constitution of the United States, as applied to a foreign corporation which maintained permanently within Georgia a sales service office and sales service employees and which engaged regularly and competitively within Georgia in a variety of sales service activities when all of its sales were consummated at its home office outside Georgia and all of its activities within Georgia were in connection with such sales?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section 8, Clause 3 of Article I of the Constitution of the United States provides:

> "The Congress shall have power . . . to regulate commerce . . . among the several states. . . ."

Section 1 of Amendment XIV of the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Section 92-3102 of the Code of Georgia of 1933[1] provides:

> "Rate of taxation of corporations—Every domestic corporation and every foreign corporation shall pay annually an income tax equivalent to five and one-half per cent. of the net income from property owned or from business done in Georgia, as defined in Section 92-3113."

Section 92-3113 of the Code of Georgia of 1933[2] provides:

> "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every

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[1] Codifying Section 4 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26) as amended and in effect for the taxable years 1952, 1954 and 1955, except that the rate was reduced to four percent for taxable years beginning on or after January 1, 1955.

[2] Codifying Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., 24, 26) as amended and in effect for the taxable years 1952, 1954 and 1955. Italicized portion was added by 1950 amendment (Ga. Laws 1950, 299, 300-303). For full text including further provisions for allocating and apportioning net income from business done partly within and partly without the State, see Appendix, infra, 57.

corporation, foreign or domestic, owning property or doing business in this State. **Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce. . . .**"

STATEMENT OF THE CASE.

For the taxable years 1952, 1954 and 1955 Petitioner, as State Revenue Commissioner of the State of Georgia, assessed and collected as Georgia income taxes, pursuant to the aforesaid Sections 92-3102 and 92-3113, $18.73, $489.48 and $970.10 respectively, from Respondent. In due time, Respondent filed claims for refund of the aforesaid taxes and these claims were denied by Petitioner (R. 2).

Thereafter, in due time, Respondent filed a suit against Petitioner to recover the aforesaid taxes. In its petition Respondent neither disputed the computation of these taxes nor the reasonableness of the apportionment of its net income to Georgia under the statutory apportionment formula prescribed by the further paragraphs of Section 92-3113; no discrimination was charged. It based its right to recover squarely upon the unconstitutionality of Sections 92-3102 and 92-3113 under the commerce clause (Article 1, Section 8, Clause 3) and the due process clause (Fourteenth Amendment) of the Constitution of the United States as applied to its activity within the State of Georgia, which it characterized as being entirely in interstate commerce and entirely beyond the territorial limits of the State of Georgia (R. 21-25). These were the only questions of law raised by Respondent's petition.

The case was tried on an agreed stipulation of facts which is in the record before the Court (R. 1-13). Briefly the important facts are:

During the tax years in question, Respondent was a Delaware corporation with its principal office and manufacturing plant at Birmingham, Alabama. It was engaged in the business of manufacturing and selling valves and pipe fittings and in promoting the sale of these products. Purchasers of its products were established local wholesalers and jobbers located in all of the United States. It maintained inventories of its products in established warehouses at Birmingham, Alabama, Philadelphia, Pennsylvania, Chicago, Illinois, Houston, Texas, and Vernon, California. It maintained established sales service offices at the above locations and also at Cambridge, Massachusetts, New York, New York, Pittsburgh, Pennsylvania, San Francisco, California, Washington, D. C., Dallas, Texas, St. Louis, Missouri, and **Atlanta, Georgia** (R. 2, 3).

Respondent accepted all orders at its Birmingham office and made all deliveries "f. o. b. warehouse" (R. 4, 5). In other respects it meticulously followed the customary procedures that foreign corporations have adopted for insulating themselves from local obligations (R. 8, 9).

But this is not all. The details of Respondent's method of operation, using these established sales service offices, and, particularly its sales service activities through its Atlanta office and Atlanta representative, in summary, show that Respondent's activity in and through its Atlanta office and its Atlanta representative was no casual, transitory, spasmodic, traveling-drummer type of activity—they show that Respondent permanently, designedly, and competitively engaged in soliciting business and in many additional activities and services within Georgia, the total purpose and effect of which was to establish, identify, and

operate its Atlanta office and its Atlanta representative as local in the same sense as its competitors who sold comparable products from local inventories in Georgia (R. 3-8).

The trial court found that Respondent, "during the tax years in question, engaged in substantial activities within the State of Georgia for financial profit or gain within the meaning of Code Section 92-3113 . . . that the taxes collected by Defendant from Plaintiff under Code Section 92-3102, being taxes on Plaintiff's net income fairly apportioned according to its activities within the State of Georgia, did not constitute a burden on interstate commerce nor were they levied or collected in violation of due process under the Federal Constitution as alleged by Plaintiff's petition" (R. 13, 14).

On appeal to the Supreme Court of Georgia this judgment was reversed (R. 28). Now this judgment is before this Court on writ of certiorari (R. 39).

SUMMARY OF ARGUMENT.

A. *The Interstate Commerce Aspect.*

1. A tax on net income is a tax on the realization of gain from property or economic activity; it is not a tax on the property or economic activity which is the source of the gain. This proposition, first applied by the Court to interstate income forty years ago in **United States Glue Co. v. Town of Oak Creek**, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918), along with **Peck & Co., Inc., v. Lowe**, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918), represented new thinking on the part of the Court; it has gathered strength over the years by reaffirmation in **Metcalf & Eddy v. Mitchell**, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926) and **Graves v. New York ex rel. O'Keefe**, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939); it was directly applied to a foreign corporation engaged exclusively in interstate commerce in **West Publishing Co. v. McColgan**, 328 U. S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603 (1946), affirming per curiam the Supreme Court of California, 27 Cal. 2d 705, 166 P. 2d 861 (1946); it has emerged as bedrock in income taxation—both state and federal—and precludes any contention that a net income tax is a direct tax on interstate commerce.

2. A general tax on net income derived exclusively from interstate commerce is neither *per se* a franchise tax, nor *per se* a tax on gross receipts. A general tax on net income **as such** is itself a constitutional channel by which interstate commerce can be required to share in the tax burden of the states in which it operates. The effort by fair apportionment to establish the franchise tax as another constitutional channel for this purpose, aborted in **Spector Motor Service, Inc., v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), proceeded on the premise that a franchise tax measured by net income is like a net

income tax, not that a net income tax is like a franchise tax. The "tangled underbrush of past decisions" seeking to justify franchise taxes on the basis of "a local incident" have no relevance with respect to a general income tax. Nor is a general tax on net income *per se* a tax on gross receipts; it takes no toll from each interstate transaction. Reducing the base of a tax from gross receipts or gross income to net income does more than justify the tax by limiting it to profitable businesses; it indicates a concern with taxing gain as such and no concern with taxing the activity epitomized by gross receipts.

3. A general tax on net income, like a property tax, does not unduly burden interstate commerce. Neither the property of a private corporation used exclusively as an instrumentality of government, nor its income, enjoys any immunity from state taxation. **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579 (1819); **Railroad Company v. Peniston**, 18 Wall. 5, 21 L. Ed. 787 (1873); **Metcalf & Eddy v. Mitchell**, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926). The property of a private corporation used exclusively in interstate commerce or as an instrumentality of interstate commerce likewise enjoys no immunity from state taxation. **Old Dominion Steamship Co. v. Virginia**, 198 U. S. 299, 25 S. Ct. 686, 49 L. Ed. 1059 (1905). Neither should its income.

B. *The Due Process Aspect.*

1. Due process does not prohibit the taxation of income of a non-resident earned within the taxing state. **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920); **New York ex rel. Whitney v. Graves**, 299 U. S. 366, 57 S. Ct. 237, 81 L. Ed. 285 (1937).

2. Due process, for in personam jurisdictional purposes, requires only "minimum connections." The Court no

longer bases in personam jurisdiction over a foreign corporation circuitously on "presence," "doing business" or "consent," but directly on purposeful activities done on its behalf by its agents and employees within the state seeking jurisdiction. **International Shoe Co. v. Washington,** 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); **McGee v. International Ins. Co.,** 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 223 (1957). The test is "minimum connections." **Miller Bros. Co. v. Maryland,** 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954).

3. The continuous, designed and competitive exploitation of the markets of the taxing state constitutes sufficient connection to satisfy due process. Even though the activities of a foreign corporation are exclusively interstate commerce they are nonetheless physically within some state, and activities which meet the requirements of due process for purposes of service also meet the requirements of due process for purposes of taxation. It is the **quality** of the connections, their regularity, continuity and deliberate design, and not the quantity that is important. **International Shoe Co. v. Washington,** 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); **General Trading Co. v. State Tax Commission,** 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944).

4. Due process also requires, for income taxing purposes, that the income have a situs or source within and limited to the taxing state. **Hans Rees' Sons v. North Carolina,** 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931). This is a second requirement of due process independent of "minimum connections". Income has a situs according to the property or activity which produces the income. **Shaffer v. Carter,** 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

5. A fair apportionment statute reflects income having a situs or source within the taxing state and necessarily

establishes that the taxing state has afforded the recipient thereof "opportunities, benefits or protection." **Underwood Typewriter Co. v. Chamberlain**, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920); **Butler Bros. v. McColgan**, 315 U. S. 501, 65 S. Ct. 701, 86 L. Ed. 991 (1942); **Ott v. Mississippi Valley Barge Line Co.**, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949); **Braniff Airways, Inc., v. Nebraska**, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954).

C. *The Multiple Burdens Aspect.*

1. Given a general income tax on fairly apportioned net income, the threat of a second income tax on entire net income at the taxpayer's domicile merely raises the long-time question of whether due process prohibits more than a single situs for the taxation of income. In **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), the Court unequivocally authorized, under due process, a taxable situs for income at its source. In **Lawrence v. State Tax Commission**, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1932), the Court, under due process, allowed income also to be taxed at the domicile of its recipient. While **Lawrence** created a threat of multiple taxation, it also decided that due process is not violated thereby.

2. However, if the commerce clause prohibits what the due process clause allows, that is, the foregoing threat of multiple taxation, the state of domicile or principal office is required to yield, not the state or states in which the income is earned. **Standard Oil Co. v. Peck**, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427 (1952).

3. As among states from which income is derived, a fair apportionment formula by its nature precludes multiple taxation of the total net income. If conceivably more than 100%, as a practical matter, can be taxed, it is because

the taxpayer has failed to carry the burden of showing an unreasonable formula or because apportionment formulas used among the several income-taxing states are not uniform in their make-up.

4. The burden of keeping records and filing returns as required by the various states in which a taxpayer chooses to do business and in which it earns its income is no more than an incidental burden on interstate commerce and does not invalidate an otherwise constitutional channel of taxation.

ARGUMENT AND AUTHORITIES.

A. *The Interstate Commerce Aspect.*

We, of course, concede that the commerce clause by its own force creates an area of trade free from interference, including taxation, by states in which this trade takes place. **Freeman v. Hewit**, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946). However, this freedom, as it relates to state taxation, is not absolute; there are constitutional channels by which a state can validly make interstate commerce pay a fair share of its tax burden. **Spector Motor Service, Inc., v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

Now, for forty years, since 1918, the decision in **United States Glue Co. v. Town of Oak Creek**, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918), has stood for the proposition that a general net income tax on interstate income is a constitutional channel by which interstate commerce can be required to pay its way. Whatever question remained after **U. S. Glue**, stemming from the fact that the taxpayer was a domestic corporation and engaged also in local activity, was dispelled by the decision in **West Publishing Co. v. McColgan**, 328 U. S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603 (1946), affirming per curiam the decision of the Supreme Court of California, 27 Cal. 2d 705, 166 P. 2d 861 (1946), where the taxpayer was a foreign corporation engaged in exclusively interstate activity.

The present challenge of this long-established proposition is apparently prompted by the 1951 decision in **Spector Motor Service, Inc., v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573. More particularly, it can be traced to footnote 6 of the majority opinion in that case which is

interpreted by some to treat a franchise tax[3] measured by net income and a general tax on net income as the same thing and to imply that the validity of a general net income tax applied to exclusively interstate income is yet open for adjudication.

It was clearly important in **Spector** that the courts of Connecticut had determined that the tax in that case was "placed unequivocally on the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State." In the case at bar, because Stockham was engaged within Georgia in exclusively interstate activity, the Supreme Court of Georgia followed the **Spector** decision assuming that it made no difference whether the tax is a franchise tax or a general net income tax.

We believe that the franchise tax is one channel of taxation, that the general net income tax is another, and that the latter is not merged into the former simply because a franchise tax can be measured by net income. These distinctions in terminology are meaningful and must be maintained because they are the language involved in this problem; whether they are equivalents in law is, in one sense, an issue in this case.

The starting point, as we understand it, is to find out what the General Assembly of Georgia intended to tax under Section 92-3102. Even a cursory examination of the Georgia Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., pp. 24-60) will show that it is a general tax laid directly on income earned in Georgia. By its title it is "to provide for levying, assessing and collecting a tax on net incomes." Section 1 (Code Section 92-3101[4]) imposes the tax on the

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[3] We use the term "franchise" tax throughout this brief to include occupation, privilege or license taxes.

[4] Appendix, infra, 57.

income of individuals and Section 2 (Code Section 92-3102[5]) imposes the tax on corporations. **It is an income tax like the federal income tax.** The first Georgia income tax in 1929 (Ga. Laws 1929, pp. 92-99) even specified the levy of "an income tax similar to that of the United States"; this similarity continues in practically every provision of the Georgia income tax statutes. We want the Court to see that in the Georgia net income tax there is no trace of camouflage, subterfuge, or effort at indirection through the use of the "correct" label.

Moreover, the Georgia net income tax is no "second structure" income tax; that is, it is not a separately enacted tax on net income complementary to a franchise tax measured by net income and designed to cover taxpayers otherwise immune from the franchise tax. Concurrently with its general net income tax, Georgia does impose, under Section 92-2401[6] a franchise tax on domestic corporations, and, under Section 92-2403[7] a franchise tax on foreign corporations for the privilege of doing business in Georgia. Neither of these franchise taxes is measured by net income. The franchise tax on foreign corporations, as early as 1923, was declared unconstitutional by the Supreme Court of Georgia as applied to a foreign corporation engaged within Georgia in exclusively interstate commerce. **Dennison Manufacturing Co. v. Wright,** 156 Ga. 789, 120 S. E. 120. It has not since been applied to such corporations.

The general net income tax under Section 92-3102 is not complementary to the franchise taxes under Sections 92-2401 and 92-2403; it is imposed **in addition to and independently of** these franchise taxes. Thus, we say that the Georgia tax is a direct general net income tax, meaning that it is not by indirection a franchise, occupation, priv-

[5] Constitutional Provisions and Statutes Involved, supra, 3.

[6] Appendix, infra, 57.

[7] Appendix, infra, 57.

ilege or license tax measured by net income or intended to complement a franchise, occupation, privilege or license tax otherwise inapplicable to taxpayers engaged exclusively in interstate commerce. The taxes involved in this case were imposed as income taxes under Section 92-3102; and in nowise has Petitioner sought to impose the franchise tax under Section 92-2403 against Stockham.

Now the Supreme Court of Georgia does not deny this. It did not find, as did the Supreme Court of Connecticut in **Spector**, that the legislature intended to fix the legal incidence of the tax "unequivocally on the corporation's franchise for the privilege of carrying on exclusively interstate [commerce] within the State." Indeed, it could not because Section 92-2403 imposes such a tax, and the taxes involved here were imposed under Section 92-3102 and not under Section 92-2403. The decision of the Supreme Court of Georgia, then, does not construe Section 92-3102 to impose a franchise tax; rather, it holds, in effect, that, as a matter of law, **irrespective of legislative intent**, a general net income tax on exclusively interstate income is *per se* a franchise tax or tax on the privilege of engaging in interstate business.

This points up, we think, the crucial question whether a state tax on net income, **similar to the federal tax on income**, is *per se* a franchise, occupation, privilege or license tax requiring, for constitutional validity, that elusive factor called "a local incident," or, whether it is, in and of itself, a constitutional channel of taxation, subject only to the constitutional requirements of due process.

1. **A tax on net income is a tax on the realization of gain from property or economic activity; it is not a tax on the property or economic activity which is the source of the gain.**

It is elementary that the legal incidence of a net income tax is the realization of gain from property or economic

activity. In **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), the Court (Mr. Justice Pitney) said:

> "In a well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.
>
> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay." (pp. 50-51)

Thus, property and activity, or a combination of the two, are the sources of income, and the gain therefrom is something different and is itself a basis of taxation.

The relationship between net income and its sources is a very basic problem in both federal and state income taxation. It is not a new problem; it ranges beyond interstate commerce and becomes involved whenever a source of income is afforded constitutional protection.

Manifestations of the problem first appeared in the relationship between net income and public salaries. In **Dobbins v. Erie County**, 16 Pet. 435, 10 L. Ed. 1022 (1842), the Court invalidated a Pennsylvania tax imposed upon the office of an officer of the United States measured by its emoluments. At that time the Court could see no difference between a tax on the office and a tax on its emoluments—both taxed an instrumentality of the United States.

Subsequently in **Collector v. Day**, 11 Wall. 113, 20 L. Ed. 122 (1871), the Court held that the federal income tax of the Civil War period could not constitutionally include income derived from compensation paid by a state because it was a tax on an instrumentality of state government.

Another manifestation of the problem appeared in 1895 in the relationship between rental income and the property producing such income. In **Pollock v. Farmers Loan & Trust Co.**, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895), the Court held that the federal income tax of 1894 could not, without apportionment among the states according to population as constitutionally required for direct taxes, include rents because a tax on rents was a tax on the property which produced the rents and a direct tax. It also held that this tax could not include interest from state bonds because it was a tax on an instrumentality of government. This decision was expressly based on **Collector v. Day**; and these three decisions would seem to have established the proposition that a tax on net income **is** a tax on the source of that income.

However, a change was in the making; another manifestation of the problem appeared in 1918 in the relationship between net income and exporting. In **Peck & Co., Inc., v. Lowe**, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918), the Court held that the federal income tax did not "directly" bear on the "process of exporting" so as to be in substance a tax on exports in violation of the Constitution; the Court (Mr. Justice Van Devanter) said:

"The tax in question is unlike any of those heretofore condemned. . . . [I]t is an income tax laid generally on net incomes. . . . It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. . . . The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws." (p. 174-75)

One of the taxes theretofore condemned by the Court was a tax on the occupation of exporting, which, in **Brown v. Maryland**, 12 Wheat. 419, 6 L. Ed. 678 (1827), had been invalidated as a tax on exports. This was a significant distinction—a tax on the occupation of exporting was invalid but a tax on the income from the occupation was not.

At the same time, the Court decided **United States Glue Co. v. Town of Oak Creek**, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918), dealing with the relationship between net income and interstate commerce. The Wisconsin tax was a net income tax; about $96,000 of the taxpayer's net income had been derived from transactions strictly in interstate commerce. There can be no mistaking that the Court in that case pointed out two distinguishable lines of cases: (1) The direct (franchise and gross receipts) tax cases, and (2) the indirect (property and income) tax cases. There can be no mistaking, either, that the decision

in **U. S. Glue** was controlled by **Peck & Co.** which, as shown, was decided precisely on the relationship between income and the source of that income. It is true the United States Glue Company was a domiciliary of Wisconsin and that it was engaged in both interstate and intrastate commerce. If the legal incidence of a general tax on net income **as income** is understood, as Mr. Justice Pitney evidently understood it, these considerations are without importance. Obviously, if income is exempt from taxation because of its protected source, it is exempt whether the taxpayer is an individual or a corporation, foreign or domestic, and whether the taxpayer has other income from local sources or not. This was confirmed by the per curiam decision in **West Publishing Co. v. McColgan,** 328 U. S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603 (1946), affirming the Supreme Court of California, 27 Cal. 2d 705, 166 P. 2d 861 (1946).

Thus, the decision in **Peck & Co.** and **U. S. Glue** stood together in apparent conflict with **Farmers' Loan and Trust Co.** and **Collector v. Day** on the question of the relationship between net income and the source of that income.

In 1926, in **Metcalf & Eddy v. Mitchell,** 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, the Court held that the federal income tax applied to gain derived from state government contracts was not a tax on an instrumentality of government.

In 1937, in **Hale v. State Board,** 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72, involving the Iowa income tax and its relationship to interest on tax-exempt state bonds, the Court expressly limited **Farmers' Loan and Trust Co.** to the context of "direct" taxes under Article I, Section 2, Clause 2 of the Constitution governing the apportionment of direct taxes among the states. (See p. 107).

Then, in 1939, the coup de grace to the proposition that a tax on income is a tax on its source was administered in

Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, dealing with the relationship between the New York income tax and compensation paid by the federal government, wherein the Court (Mr. Justice Stone) expressly overruled **Collector v. Day**, saying:

> "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable . . ." (p. 480)

We urge that the principle of **U. S. Glue**—that a tax on net income is not a tax on the source of that income—is not limited to the context of interstate commerce but is a manifestation of a broader principle that is a part of the warp and woof of all income taxation—state and federal.

The reiterations of this proposition in income tax cases in this country are legion. In **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), the Oklahoma income tax on a non-resident's profit from the operation of oil wells in Oklahoma was upheld against the contention that it constituted a burden on interstate commerce. There the Court (Mr. Justice Pitney) said:

> "Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, . . . but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce." (p. 57)

Similarly, in **Atlantic Coast Line R. Co. v. Daughton**, 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051 (1923), dealing with the North Carolina income tax, the Court (Mr. Justice Brandeis) said:

> "Under the commerce clause it is essential that a state tax shall not directly burden interstate commerce and that it shall not discriminate against interstate commerce. With these essentials the North Carolina

act complies. It is not assessed on gross receipts." (p. 422)

In **New York ex rel. Cohn v. Graves**, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666 (1937), the Court upheld the New York income tax against a New York resident which included rental income from property located outside New York. In so doing, the Court (Mr. Justice Stone) said:

> "Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source." (p. 313)

Again, in **Wisconsin v. Minnesota Mining & Mfg. Co.**, 311 U. S. 452, 61 S. Ct. 253, 85 L. Ed. 274 (1940), the Wisconsin general corporate income tax was upheld against the contentions that it violated the commerce clause. The Court (Mr. Justice Frankfurter) said:

> "The Commerce Clause is invoked. But it is too late in the day to find offense to that Clause because a state tax is imposed on corporate net income of an interstate enterprise which is attributable to earnings within the taxing state, . . ." (p. 453)

See also, **Hans Rees' Sons v. North Carolina**, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931); **Norfolk & W. Ry. Co. v. North Carolina**, 297 U. S. 682, 56 S. Ct. 625, 80 L. Ed. 977 (1936); **Helvering v. Mountain Producers Corp.**, 303 U. S. 376, 58 S. Ct. 623, 82 L. Ed. 907 (1938); **Wisconsin v. J. C. Penney Co.**, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940); **International Harvester Co. v. Wisconsin**, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944).

Thus, as we see it, the Court has unmistakably declared that a tax on net income is not a tax on the source of that income—be it property or activity. This proposition cannot be ignored; it refutes absolutely the contention that a

tax on net income from interstate commerce is a tax on interstate commerce. It is reinforced by a history of judicial travail which has run the gamut of legal argument over and over again to emerge as basic to both state and federal taxation. We think it controls this case.

2. **A general tax on net income derived exclusively from interstate commerce is neither per se a franchise tax nor per se a tax on gross receipts.**

The legal incidence of a franchise tax is the exercise of the franchise, and where particular activity is protected by the Constitution against taxation then, of course, any tax thereon is invalid. This is the holding of **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579 (1819), as applied to the exercise of a governmental function, **Brown v. Maryland**, 12 Wheat. 419, 6 L. Ed. 678 (1827), as applied to the occupation of exporting, **Ozark Pipe Line Corp. v. Monier**, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (1925), **Alpha Portland Cement Co. v. Massachusetts**, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (1925), and **Spector Motor Service, Inc., v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), as applied to interstate operations. These decisions are not, in the least, being questioned here because they, dealing with franchise taxes, have no application to a general tax imposed directly on net income.

We do not, of course, deny that "doing business" within the taxing state is a jurisdictional requirement for taxation. **Miller Bros. Co. v. Maryland**, 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954). But, this hardly converts every tax into a franchise tax on doing business. **Wheeling Steel Corp. v. Fox**, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

The contention of Respondent, however, is that a general tax imposed directly on net income is *per se* (irrespective of legislative intent) a franchise tax. If a tax on net income is not a tax on its source, as we have shown, then

a tax on net income cannot be a tax on interstate activity and a franchise tax.

The Court has repeatedly acknowledged that there are constitutional channels by which states can require interstate commerce to share in their tax burdens. The property tax is one; the highway use tax is another; and the general income tax is another. The franchise tax has never been a constitutional channel for taxing interstate commerce. Where franchise taxes upon corporations engaged in interstate commerce have been approved by the Court it has been upon finding in their operations "a local incident" (i. e., some aspect of interstate activity distinctly local). **American Mfg. Co. v. St. Louis**, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084 (1919); **Western Live Stock v. Bureau**, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1938). The tax in these cases was permitted to be laid upon the exercise of this "local incident"; the measure of such a tax may be some manifestation of the total enterprise standing in a causal relationship to the "local incident". **Great Atlantic & Pacific Tea Co. v. Grosjean**, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193 (1937). Only in a loose sense can it be said that this line of development has opened up a channel by which interstate commerce can be required to share in the local tax burden. It may be that Mr. Justice Stone had in mind, when writing his opinion in **Memphis Natural Gas Co. v. Beeler**, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942), that this line of development had worked itself into an equation with the net income tax as a constitutional channel of taxation; if this were true, it was undoubtedly because he found a franchise tax measured by net income like a net income tax and not because he found a net income tax like a franchise tax.

The history of the Court's dealings with franchise taxes, interstate commerce, and "a local incident" is, indeed, a "tangled underbrush of past cases". Since a tax on net

income is not a tax on the source of that income, as we have shown, these cases have no application here, and there is no more need to consider them here than for Mr. Justice Burton to have considered **U. S. Glue** in his **Spector** opinion.

Likewise, since **Fargo v. Michigan**, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888 (1887), and **Philadelphia Steamship Co. v. Pennsylvania**, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (1887), the Court has held that a tax on gross receipts from interstate commerce is *per se* a tax on interstate commerce. This proposition has continued as constitutional doctrine and served to invalidate the Indiana gross income tax in **Adams Mfg. Co. v. Storen**, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 (1938), and **Freeman v. Hewit**, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

But a general tax on net income is not converted into a tax on interstate operations simply because a tax on gross income is construed to be a tax on gross receipts. When this Court affirmed **West Publishing** in 1946 it must have rejected any contention that a net income tax was like the gross income tax declared invalid in **Adams** eight years earlier.

The evil in a gross receipts tax is its effect as a sort of duty imposed on commerce between the states. It was first condemned in **State Freight Tax Cases**, 15 Wall. 232, 21 L. Ed. 146 (1872), in the form of a tax on every ton of freight picked up for interstate carriage or delivered from interstate carriage; the Court viewed it as a duty imposed on the freight itself collected by the transportation company as a tax collector for the state. During the same term the Court approved a tax on the gross receipts from interstate transportation. **State Tax on Railway Gross Receipts**, 15 Wall. 284, 21 L. Ed. 164 (1873).

In **State Tax on Railway Gross Receipts**, the Court saw a distinction between a tax as a duty on the articles of

commerce, of which the transportation company was merely the collector, and a tax on the gross receipts of the transportation company as its own obligation. Said Mr. Justice Strong:

> "The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. . . . The tax is not levied, and, indeed such tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country." (pp. 294-95)

We know, of course, that **Fargo v. Michigan** and **Philadelphia Steamship** distinguished **State Tax on Railway Gross Receipts** and held a tax on gross receipts from interstate transportation to be invalid. The opinion of Mr. Justice Bradley, in **Philadelphia Steamship**, reveals the same ratio decidendi as the decision in **State Freight Tax Cases**:

> "Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called

upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment." (pp. 341-42)

Out of these cases we can see two important aspects of the Court's thinking: (1) The conception of a gross receipts tax as taking a toll or duty from every dollar of interstate commerce, and (2) the recognition that, though gross receipts epitomizes in money terms the activity which produced them, nevertheless, at some point the receipts lose identity with their source.

We think Mr. Justice Pitney, in his opinion in **U. S. Glue**, was referring to these considerations when he said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (pp. 328-29)

How does changing the base of a tax from gross receipts to net income change the legal incidence of the tax? In the first place, it cannot be said that a net income tax, like a gross receipts tax, takes its toll from each and every transaction in interstate commerce as a custom collector does. The net income of a business is seldom realized ratably with each transaction; a net income tax takes no toll from the first transaction of the year, nor from the last, nor from any particular transaction during the year. Second, by reducing gross receipts by various deductions, including personal exemptions, the legislature clearly demonstrates its concern, not to tax inexorably the activity which produced the income, but to tax only increase in net worth. Some deductions, for example charitable contributions, have no connection whatever with business activity; others may have no connection with business activity within a particular state. Gain, of course, is the legal incidence of the net income tax and essential to it; but the difference between a tax on gross receipts and a tax on net income is not that the gain justifies the income tax—it is that a taxing scheme which allows for deductions demonstrates thereby beyond a doubt that the impact of the tax is not on receipts epitomizing economic activity but on realized gain itself.

Respondent's attempt to equate a net income tax with a gross receipts tax entails another important consideration. The constitutionality of the graduated income tax is well established. **Brushaber v. Union Pacific R. Co.**, 240 U. S. 1, 36 S. Ct. 236, 60 L. Ed. 493 (1916). The concept is, of course, that the net income within each bracket constitutes a separate and reasonable classification justified by its direct measure of ability to pay; the tax is solely and directly upon the income within each bracket. A graduated tax on gross receipts has been held unconstitutional by the Court in **Stewart Dry Goods Co. v. Lewis**, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed.

1054 (1935). While some doubt may be cast upon the soundness of this decision by **Great Atlantic & Pacific Tea Co. v. Grosjean**, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193 (1937), it is impossible to justify progressive rates of taxation on gross receipts by ability to pay. The justification of graduated rates of income taxation on the basis of ability to pay has been too long with us now to switch to whatever justifications exist for graduated gross receipts taxation.

3. **A tax on net income is a general tax, and, like a general property tax, does not unduly burden interstate commerce.**

We have shown that the Georgia income tax is a tax on net income **as such**, and not by indirection a tax on anything else. We have also shown that a net income tax is only remotely, and not directly, related to activity and transactions in commerce. The Georgia tax is a general tax imposed on all income "'derived from any source whatever and in whatever form paid";[8] it subjects all persons, partnerships, associations, trusts, as well as corporations to its terms; it is intended to reach only income derived from Georgia sources; it applies without discrimination to non-residents and foreign corporations as well as residents and domestic corporations, and, finally, it is a substantial source of revenue and means of distributing the costs of state government.

It might be well, at this time, to recall that the tax invalidated in **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579 (1819), was a tax on the operations of the Bank of the United States which was, through a private corporation, an instrumentality of the United States. Its legal incidence, then, was like the legal incidence of a

[8] Code Section 92-3107 codifying Section 10 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., p. 30).

franchise tax. For present purposes, there should be no difference in the constitutional protection afforded a private corporation which is an instrumentality of the United States and a private corporation which is an instrumentality of interstate commerce or engaged exclusively in interstate commerce. It is important to note from the opinion in **M'Culloch v. Maryland** that Mr. Chief Justice Marshall, strong Federalist though he was, took pains to point out that the decision in the case did not deprive the states of power to tax the property of the Bank.

In **Railroad Company v. Peniston**, 18 Wall. 5, 21 L. Ed. 787 (1873), following **Thomson v. Union Pacific R. Co.**, 9 Wall. 579, 19 L. Ed. 792 (1870), the Court held that the property of an agent of the United States, though a federal instrumentality, was not exempt from state taxation.

In **Peniston** the Court (Mr. Justice Strong) said:

> "In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in **Thompson v. Union Pacific**. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, **taxed in common with all other property in the State of a similar character.** It is impossible to maintain that this is an interference with the exercise of any power belonging to the General government, and if it is not, it is prohibited by no constitutional implication." (p. 37; emphasis added)

Of course, the Court is right; there is no derivative immunity accorded the property of a private contractor even though used in federal service. Indeed, the Court recently

held that the tax immunity of federally-owned property is lost by its used by a private contractor. **Continental Motors Corp. v. Muskegon,** 355 U. S. 484, 78 S. Ct. 483, 2 L. Ed. 2d 436 (1958); **Detroit v. Murray Corp.,** 355 U. S. 489, 78 S. Ct. 458, 2 L. Ed. 2d 441 (1958). And there is no derivative immunity accorded the income of a private contractor derived from government contracts. **Metcalf & Eddy v. Mitchell,** 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926). Private corporations as instrumentalities of interstate commerce or engaged exclusively in interstate commerce should be in no better position than private contractors engaged exclusively as instrumentalities of government either with respect to state taxation of their property or of their incomes.

The Court has never deemed it necessary to protect interstate commerce from a general property tax levied upon all property within the taxing jurisdiction. In **Transportation Co. v. City of Wheeling,** 9 Otto 273, 25 L. Ed. 412 (1879), a general property tax on vessels used in interstate commerce was upheld against the contention that it was a prohibited duty on tonnage. The Court (Mr. Justice Clifford) said:

> "Annual taxes upon ships and vessels for the support of the State governments as property, upon a valuation **as other personal property,** are everywhere laid; . . ." (p. 279; emphasis added)

In **Pullman's Palace Car Co. v. Pennsylvania,** 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891), the Court (Mr. Justice Gray) said:

> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, **like other personal property within its jurisdiction."** (p. 23; emphasis added)

In **Old Dominion Steamship Co. v. Virginia**, 198 U. S. 299, 25 S. Ct. 686, 49 L. Ed. 1059 (1905), a general property tax applied to a steam tug, used solely within Virginia waters but incident to exclusively interstate commerce, was upheld.

The citation of additional cases is hardly necessary; the constitutionality of a general property tax on property within a state used exclusively in interstate commerce is beyond question. These old decisions need not be recast in terms of "a local incident"; indeed, the local pick-up and delivery service involved in **Spector** did not amount to "a local incident" sufficient to justify a franchise tax, yet no one would contend, we believe, that the local pick-up and delivery trucks there were immune to a local property tax because they were involved exclusively in interstate commerce. It is not, we think, "a local incident" that qualifies property used in interstate commerce for local taxation; rather, it is (1) that a property tax is a general tax necessarily precluding any disadvantage or discrimination against interstate commerce; (2) that the incidence of a property tax, mere ownership, is only remotely related to the activity and transactions of commerce; and (3) that there is justice involved in requiring interstate commerce to pay a fair share of the local tax burden.

These considerations have been applied to a general income tax. Consider, for example, the federal income tax and the constitutional prohibition against a federal tax on exports; the income tax was upheld in **Peck & Co., Inc., v. Lowe**, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918), where the Court (Mr. Justice Van Devanter) said:

> "'[I]t is an income tax laid generally on net incomes. . . . It is not laid on income from exportation because of its source, or in a discriminative way, **but just as it is laid on other income.**": (p. 174; emphasis added)

Earlier, in **Philadelphia Steamship Co. v. Pennsylvania**, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (1887), Mr. Justice Bradley, dealing with a tax on interstate gross receipts, was prompted to say:

> "Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. **It is not a general tax on the incomes of all the inhabitants of the state**; but a special tax on transportation companies." (pp. 344-45; emphasis added)

The analogy between a general property tax and a general income tax in this respect was expressly drawn by Mr. Justice Pitney, in his opinion upholding the Wisconsin income tax in **U. S. Glue**, when he said:

> "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, **like a tax upon property**, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." (p. 329; emphasis added)

The decision in **U. S. Glue** was discussed from this standpoint by the late Professor Thomas Reed Powell in an article in the Harvard Law Review.[9] He concluded:

> "If the property of those engaged exclusively in interstate commerce is not exempt from state taxation,

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[9] *Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, 32 Harv. L. Rev. 634 (1919).

there is no reason to accord them immunity from a tax on their net income, which is 'but a method of distributing the cost of government, like a tax upon property.' . . .

"Reason and psychology combine to warrant the expectation that the Supreme Court will not exclude foreign corporations engaged exclusively in interstate commerce from the 'corporations otherwise subject to the jurisdiction of the states' with respect to taxes on net incomes.

"It seems safe, therefore, to state the principle of the Oak Creek case by saying that a general state-wide tax on net income is not 'an unconstitutional interference with or regulation of commerce among the states' by reason of the inclusion of net income from interstate commerce. . . .

"We may take it for granted, then, that the legal character of the recipient and the nature of the business in which the recipient is engaged are immaterial elements in considering the constitutionality of a state-wide, all-inclusive general tax on net income from business done within the state. The recipient may be an individual, a partnership, a domestic or foreign corporation. The business may be exclusively interstate. But the tax must be general, and the measure must probably be net, and not gross, income . . ." (pp. 637-39)

The Georgia income tax is a general **net** income tax imposed on all income derived from sources in Georgia in the same way that its property tax is a tax on all property having a situs in Georgia; the character of the recipient and how the income is earned, like the character of the owner of property and how the property is used, are not material considerations in ascertaining its legal incidence. The power to tax net income, like the power to tax property, is original with the states; no interference with inter-

state commerce is involved; this, we submit, as constitutional doctrine which supports the Georgia income tax in this case.

B. *The Due Process Aspect.*

Of course, if a net income tax is *per se* a franchise tax, under **Spector**, the Georgia income tax is invalid, and the due process issue becomes moot. Otherwise, however, it is important for us to show that due process is satisfied.

For thirty-eight years, since 1920, the decision of the Court in **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445, has stood for the proposition that a state has constitutional power to tax the income of a non-resident derived from activity within its territory. In **General Trading Co. v. State Tax Commission**, 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944), and in **International Shoe Co. v. Washington**, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the Court indicated the quality of activity prerequisite to this power; and in **Hans Rees' Sons v. North Carolina**, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931), and in **Miller Bros. Co. v. Maryland**, 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954), the Court has indicated limitations on this power.

The stipulated facts show that Stockham was definitely physically present and engaged in business within Georgia during the tax years in question. Its presence and activity was no casual, transitory, spasmodic, traveling-drummer type of activity; Stockham was permanently, regularly and competitively engaged in business within Georgia, even though it was entirely pursuant to interstate commerce.

The Supreme Court of Georgia by its reference (R. 36) to its decision in **Redwine v. Dan River Mills**, 207 Ga. 381, 61 S. E. 2d 771 (1950), and **Suttles v. Owens-Illinois Glass Co.**, 206 Ga. 849, 59 S. E. 2d 392 (1950), apparently takes the "minimum connections," referred to in **Miller Bros.**, to require at least some transactions within the taxing state,

such as the contractual consummation of a sale or the actual delivery of goods from inventory, and to ignore other activity, no matter how substantial, which does not culminate within the taxing state in some such transactions. The amendment of 1950 to Section 92-3113 purposely used the term "activities or transactions" in its definition of "doing business" to expand it beyond transactions alone and to exhaust the State's constitutional power to tax on the basis of activities within the State as well as transactions. The effect of the decision of the Supreme Court of Georgia is to say that the due process clause of the Fourteenth Amendment precludes activities other than those culminating in some transactions within the state from giving jurisdiction to tax and to ignore such activities in deciding whether the state has given any protection, opportunities and benefits for which it can reasonably demand a tax.

Such a concept of the constitutional scope of "doing business" is too narrow. Modern business being what it is, there are many important business activities which involve no contractual transactions and which make substantial contributions to the production of income; many illustrations come to mind: a research center, an advertising department, a consumer research division, a dealer training program, etc. Any one of these could be carried on within a state with no more than an office or a laboratory and one or a few employees and be a substantial factor in the production of income.

This Court, we believe, has adopted the broader view of the matter. It is significant to note that in **West Publishing** this Court cited **International Shoe** which in turn cited **General Trading**, which in turn cited **Felt & Tarrant Mfg. Co. v. Gallagher**, 306 U. S. 62 (1939), and **Nelson v. Sears, Roebuck & Co.**, 312 U. S. 359 (1941); a review of these cases will show that solicitation and other sales service activities, **conducted on a continuous, designed and competitive**

basis, are enough to satisfy due process irrespective of contractual transactions within the taxing state.

1. Due process does not prohibit the taxation of income of a non-resident earned within the taxing state.

It is not questioned that a state may impose a net income tax upon income earned by non-residents within the taxing state. This was settled in **Shaffer v. Carter,** 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920). The "radical contention" that the state could not impose such a tax without violating due process was answered by the Court in **Shaffer v. Carter** by reference to "fundamental principles." These fundamental principles are that a state in which a corporation owns property or engages in business activities confers certain benefits and protection upon the corporation and has, in return, the right to impose taxes upon such corporation to help defray the expenses of government. It is not necessary that the corporation have any tangible property in the taxing state. In **New York ex rel. Whitney v. Graves,** 299 U. S. 366, 57 S. Ct. 237, 81 L. Ed. 285 (1937), the Court upheld a New York tax upon the income derived by a Massachusetts resident from the sale of a right to purchase part of a seat on the New York Stock Exchange.

2. Due process, for in personam jurisdictional purposes, requires only "minimum connections" with the state seeking jurisdiction.

The law concerning jurisdiction of a state over a foreign corporation has gone through considerable evolution since **Bank of Augusta v. Earle,** 13 Pet. 519, 10 L. Ed. 274 (1839). It was then accepted constitutional doctrine that a corporation could not be "present" in any state except the state of incorporation and, therefore, was not subject to the jurisdiction of any other state under any circumstances. It was believed that a corporation could be present only in the state of its incorporation because

it was purely a creature of law and, since the laws of a state are limited to the territorial limits of the state, the life-force of a corporation was necessarily limited to the state which created it.

Of course, this soon proved unsatisfactory, so the Court indulged in a fictional consent or submission to the jurisdiction of a foreign state. **Lafayette Ins. Co. v. French**, 18 How. 404, 15 L. Ed. 451 (1855).

In modern times neither "presence" nor "consent" is the basis of jurisdiction over foreign corporations. As early as 1930 in **Hutchinson v. Chase & Gilbert**, C. C. A. 2d, 45 F. 2d 139, Judge Learned Hand said:

> "It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes." (p. 141)

In other words, jurisdiction over a foreign corporation is not determined circuitously by reference to its "presence" or "consent", but directly by reference to the purposeful activity of its agents and employees within the state seeking jurisdiction. This idea was adopted completely by **International Shoe Co. v. Washington**, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), where the Court (Mr. Chief Justice Stone for a unanimous Court, Mr. Justice Jackson not participating) said:

> "Since the corporate personality is a fiction, . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it." (p. 316)

Express judicial cognizance of these developments was taken recently in **McGee v. International Life Ins. Co.**, 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), where the Court (Mr. Justice Black for a unanimous Court, Mr. Chief Justice Warren not participating) said:

> "In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." (p. 222)

The best expression of the test came in **Miller Bros. Co. v. Maryland**, 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954), when the Court (Mr. Justice Jackson) said:

> "But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (pp. 344-45)

Thus, "presence" has been discarded and the inquiry is directed straight to the due process criterion: are there "minimum connections" between the foreign corporation and the state seeking jurisdiction over the corporation?

3. **The continuous, designed and competitive exploitation of the markets of a taxing state constitutes sufficient connections to satisfy due process.**

Before making any further analysis of the concept of "minimum connections" it might be well to point out several overriding propositions. The first is that actual contacts with a state are not disembodied by reason of being exclusively in interstate commerce. Such a contention was made in **International Harvester Co. v. Kentucky**, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914), but was deemed "novel" and explicitly rejected; it was also rejected in **West Publishing Co. v. McColgan**, 27 Cal. 2d 705, 166 P. 2d 861 (1946), affirmed per curiam 328 U. S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603 (1946). In other words, Stockham's activities within Georgia, as stipulated, were not any less activities within Georgia because they were exclusively in interstate commerce.

The second is that what constitutes "minimum connections" for purposes of in personam jurisdiction also constitutes "minimum connections" for purposes of taxation. In **International Shoe** the Court (Mr. Chief Justice Stone) said:

> "The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax." (p. 321)

The third is that it is the **quality** of these contacts and not necessarily the quantity that controls. Again, in **International Shoe**, it was said:

> "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. [citations omitted] Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." (p. 319).

As we shall point out later, a fair apportionment statute measures the quantity of a taxpayer's activity within the taxing state. If the activity is great, the apportionment will be great; if the activity is small, the apportionment will be small. Respondent does not challenge the fairness of the Georgia apportionment statute; hence, no question of the quantity of its activity within this state is involved.

Considerable light is thrown on the content of the "minimum connections" concept by a comparison of the facts involved in two cases decided by the Court. In **Miller Bros. Co. v. Maryland**, 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744 (1954), Maryland sought to require a foreign corporation to collect its use tax on sales made in Delaware to residents of Maryland. Maryland's assertion of jurisdic-

tion was held to violate due process because the contacts of the corporation with Maryland were not sufficient; there was no regular activity in Maryland, only the occasional delivery of goods purchased in Delaware.

However, in **General Trading Co. v. State Tax Commission**, 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944), the Court upheld the effort of Iowa to compel a Minnesota corporation to collect its use tax on sales made in Minnesota to Iowa residents. In that case the Minnesota corporation sent its agents from its Minnesota headquarters into Iowa to procure business from Iowa residents in such manner as to be treated as maintaining a place of business in Iowa. Mr. Justice Jackson, in **Miller Bros.** compared **General Trading** in this way:

> "The Court could properly approve the State's decision to regard such rivalry with its local merchants as equivalent to being a local merchant. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." (pp. 346-47)

We are led by a consideration of these cases to the conclusion that the required "minimum connections" is determined by the foreign corporation's pattern of conduct manifesting its designs on the markets of the taxing state.

The days of laissez-faire are gone, and government expenditure for the promotion of a healthy and attractive economy is not limited to the federal government. State governments, too, spend tax monies to develop their economies and provide the necessary services required therewith. There is certainly justice and fairness in requiring foreign corporations to share, through taxation, in the costs of state government when such corporations engage

in a pattern of conduct, continuously, designedly and competitively, to get all the business it possibly can out of a state's economy, using the same methods as local taxpaying competitors.

Consider Stockham's pattern of conduct and designs on the markets of Georgia. It had an established and publicly-identified office in Atlanta (R. 5) with a full-time resident representative who operated out of that office and made every effort to procure for Stockham as much business in Georgia as he could (R. 6). Stockham also employed a secretary in the Atlanta office who was in instantaneous communication with the main office in Birmingham (R. 5). This and the proximity of Birmingham to Georgia were important to Stockham because it could and did represent to prospective customers in Georgia that its service was the equivalent of local service (R. 7). Admittedly the purpose of this was to place Stockham in a position so that it could compete equally with local merchants (R. 5). The facts are that Stockham's every effort was to compete successfully in Georgia and garner as much of the Georgia market for valves and fittings as it possibly could, save only this: it was meticulous to avoid any semblance of "local activity" because it hoped thereby to escape taxation in Georgia. But the pattern of its activities in Georgia was systematic, continuous and designed; the words "occasional" and "incidental" used by the Court in describing the activity of Miller Brothers in Maryland are by no means appropriate to describe Stockham's connections with Georgia.

The activities of International Harvester in Kentucky, as described in **International Harvester Co. v. Kentucky**, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914), were very similar to the activities of Stockham in Georgia. There a definite effort was made by the company to insure that all activities in Kentucky were exclusively interstate.

The usual precautions were taken: all orders were accepted at an office outside the State; title to all shipments passed outside the State; agents in Kentucky had no discretion whatsoever, so that about all they did was solicit business in the State. Stockham was just as careful to see that its activities in Georgia remained exclusively interstate; to this end it denied to its Georgia representative the authority, contractually, to accept orders for goods (R. 4, 7); it completed all sales by deliveries to carriers outside Georgia (R. 5); it never qualified to do business in Georgia (R. 8). Unlike International Harvester, Stockham did maintain an office in Georgia, advertised the presence of the office on its letterheads, catalogues, discount sheets and sales promotional material and promoted it as the equivalent of local service (R. 5).

The Court held that International Harvester was subject to the jurisdiction of Kentucky as a criminal defendant. It was emphasized that the company was engaged in a continuous course of business, not isolated transactions. The company argued that it was engaged exclusively in solicitation of interstate commerce, and that this was not enough to confer jurisdiction; the Court replied that a **continuous** course of solicitation followed by delivery of goods into the State plus authority to receive payment was sufficient.

After the decision of the Court in **McGee v. International Ins. Company,** 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), it would appear beyond question that any regular, continuous, systematic, designed, competitive business activity carried on within a state is sufficient to give that state jurisdiction over a foreign corporation. It is not indispensable that a foreign corporation maintain an office in a state in order for that state to obtain jurisdiction over it. **General Trading Co. v. State Tax Commission,** 322 U. S. 335, 64 S. Ct. 1028, 88 L. Ed. 1309 (1944). If a foreign cor-

poration does maintain an established office in a state, that fact alone is conclusive of jurisdiction over the corporation. The decision in **Cheney Brothers Co. v. Massachusetts**, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (1918), does not contradict this proposition because the Massachusetts tax there was a franchise tax and held to be a tax on exclusively interstate commerce; in **Northwestern Consolidated Milling Co.**, decided in the same reported decision, due process was held satisfied by activity of solicitors less substantial in its quality than that of Stockham in Atlanta.

4. **Due process also requires, for income taxing purposes, that the income have a situs or source within and limited to the taxing state.**

This is a second requirement of due process independent of "minimum connections" and domiciliary jurisdiction. For example, in **Union Refrigerator Transit Co. v. Kentucky**, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905), Kentucky was prohibited by due process from imposing a property tax on all property of a domiciliary corporation. In **Mexican Petroleum Corp. v. Head**, 64 Ga. App. 529, 13 S. E. 2d 887 (1941), the State of Georgia was not permitted to tax the income of a Georgia corporation realized from a separate and disconnected phase of its business carried on in New York; while the decision was based on statutory construction, the Georgia Court of Appeals definitely thought that the decision in **Hans Rees' Sons v. North Carolina**, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931), precluded taxation of income derived from sources outside the taxing state.

The difference between these two aspects of due process can be seen in **Connecticut General Life Ins. Co. v. Johnson**, 303 U. S. 77, 58 S. Ct. 436, 82 L. Ed. 673 (1938). The question there was not whether California had jurisdiction to tax the corporation; this was conceded by the corporation because of its admission to do business in California.

The issue was whether California could tax receipts earned from reinsurance contracts made outside the state and handled completely outside the state. This shows a second due process question, that of measuring a tax, otherwise jurisdictionally imposed, by extraterritorial values. The difference was made clear in **Braniff Airways, Inc., v. Nebraska**, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954). The activity of Braniff in landing planes regularly in Nebraska gave the company sufficient contacts with the state to justify imposing a tax, but there was the further question whether the tax was measured by extraterritorial values.

Domicile, of course, gives a state jurisdiction to impose a tax on its domiciliary, and performs the same function as is performed in the case of a foreign corporation by "minimum connections". But, the fact that a person is domiciled in a state when he dies does not give that state the right to impose a death tax upon the transfer of his property which has acquired a permanent situs in another state. That was settled in **Frick v. Pennsylvania**, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058 (1925). There was no question of the jurisdiction of Pennsylvania over Frick's estate, but the tax could not be imposed upon the full value of his estate because that involved extraterritorial values.

It was made clear in **Hans Rees' Sons** that an income tax which taxes extraterritorial values violates due process. And the teaching of that case is that a state, otherwise having jurisdiction, can impose its income tax only on income having a situs or source within the taxing state.

There is nothing strange in saying that income has a situs. It is self-evident in a simple context. Suppose, for example, a foreign corporation engages in no activity within Georgia but owns a piece of unimproved realty which it sells at a gain; no one, we believe, would deny

that this gain has a situs in Georgia. On the other hand, suppose this foreign corporation owns bonds of a Georgia corporation which it sells at a gain; the source of the gain being intangible property having a situs at the domicile of the owner, so would the situs of this gain be at the domicile of the owner.

An examination of the further provisions of Code Section 92-3113 shows that it proceeds on the premise that gain has a situs according to the situs of its source.[10]

A judicial expression of this idea is to be found in **State ex rel. Manitowac Gas Co. v. Wisconsin**, 161 Wisc. 111, 152 N. W. 848 (1915), where the Supreme Court of Wisconsin said:

> "If an income be taxed the recipient thereof must have a domicile within the state, or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. . . .
>
> "The income tax law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state." (pp. 114-15)

That Court invalidated the Wisconsin income tax as applied to the bond-interest income of a non-resident saying:

> "The situs of the property out of which such income issues is that of the domicile of the creditor. . . . So the interest in question did not . . . constitute an income from sources within the state. . . ." (p. 115)

The determination of a taxable situs for income is not unlike the determination of a taxable situs for property. In the absence of proof of activity in other states sufficient

[10] See Appendix, infra, 57.

to indicate a situs there, it makes sense to consider the situs of income at the recipient's domicile or principal place of business. **Compania General de Tabacos de Filipinas v. Collector**, 279 U. S. 306, 49 S. Ct. 304, 73 L. Ed. 704 (1929); compare **Northwest Airlines, Inc., v. Minnesota**, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1944). But, given activity within and without the state of domicile or principal place of business the problem is not so easily solved.

5. **A fair apportionment statute reflects income having a situs or source within the taxing state and precludes the taxation of income having a situs or source outside the taxing state.**

Ascertaining the situs of gain from specific transactions at a particular place is one thing; ascertaining the situs of gain from a business conducted over several states is another and presents a more difficult problem because the source of that gain is activity which ignores or transcends territorial boundaries. Business activity, however, in a simple context, self-evidently has a locale or situs similar to the situs of property; and the income derived therefrom, too, has a situs which is co-extensive with the activity that produced it. Multi-state business activity has no less a situs because of the difficulties of actual allocation; the resort to formula allocation or apportionment is not a resort to abstraction but, rather, is a method of measuring concrete activity which because of its subtle manifestations and complex interactions is otherwise impossible of measurement and allocation.

The purpose of an apportionment formula was declared by the Court in **Underwood Typewriter Co. v. Chamberlain**, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920):

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture

in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State." (pp. 120-21)

The Court is, of course, familiar with the use of apportionment formulas. E. g., **Pullman's Palace Car Co. v. Pennsylvania,** 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891). Their use has generated much litigation and no purpose will be served by reviewing it at this time. It ought to be sufficient that a formula similar to the one applied against Stockham in this case was approved by the Court as to due process in **Butler Bros. v. McColgan,** 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942), where Mr. Justice Douglas, speaking for a unanimous Court, said:

"We read the statute as calling for a method of allocation which is 'fairly calculated' to assign to California that portion of the net income 'reasonably attributable' to the business done there. The test, not here challenged, which has been reflected in prior decisions of this Court, is certainly not more exacting. [citations omitted] Hence, if the formula which was employed meets those standards, any constitutional question arising under the Fourteenth Amendment is at an end." (pp. 506-507)

In **Ott v. Mississippi Valley Barge Line Co.,** 336 U. S. 169, 69 S. Ct. 432; 93 L. Ed. 585 (1949), the Court (Mr. Justice Douglas) said:

"So far as due process is concerned the only question is whether the tax in practical operation has

relation to opportunities, benefits, or protection conferred or afforded by the taxing State. [citations omitted] Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." (p. 174)

This same proposition was reaffirmed in **Braniff Airways, Inc., v. Nebraska,** 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954).

All of which is to say, as we see it, that the function of an apportionment formula in the due process context is not with respect to "minimum connections"; its use assumes that the "minimum connections" requirement of due process is satisfied and it proceeds to fix, what is known to exist but is impossible of direct proof, the situs of income; and when income is shown to have a situs at a certain place it necessarily follows that the recipient of that income has been afforded "opportunities, benefits or protection" at that place.

C. The Multiple Burdens Aspect.

Stockham has raised the traditional contention of those engaged in interstate operations that interstate commerce, because it is interstate commerce, is exposed to multiple burdens of taxation not borne by local commerce. It was, the argument runs, the intent of the founding fathers, and is now the very purpose of the commerce clause to prevent the confronting of interstate operators with a "balkanized" array of states, each to be dealt with separately, etc.

Of course, all we have said with respect to the interstate commerce aspect of this case is directed against this argument. To be sure, the commerce clause creates an area of free trade **but,** as we have shown, in taxation, it is only with respect to direct burdens—franchise and gross receipts taxes—that this area of immunity exists; it does not exist with respect to general property taxes or general in-

come taxes which stand in no direct relation to the activities of property owners or recipients of income. It goes without saying that much of the work of the Court since its beginning has been to reconcile the acknowledged justice in having interstate commerce share in the tax burdens of the states in which it operates with the purpose of the commerce clause. The argument against "balkanization," if it means absolutely no state taxes on those engaged in interstate commerce and as instrumentalities of interstate commerce, is so manifestly unjust in the federal-state relationship as to refute itself.

This Court's concern with multiple taxes on interstate commerce long antedated **Western Live Stock v. Bureau,** 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1938). Indeed, it is clear from Mr. Justice Stone's opinion that he thought the basic reason for the condemnation of franchise and gross receipts taxes was the incipiency of multiple taxation inherent in the situation; his equation of the threat of multiple taxation with the direct taxation previously condemned by the Court was an effort to narrow, not broaden, the immunity of interstate commerce from state taxation. It was clearly his idea that a situation of no-threat of multiple taxation would validate any form of state taxation; this was rejected in **Spector**. The point, of course, is that all of this development was aimed at relaxing the interstate commerce immunity from franchise and gross receipts taxes and, in no wise, at developing a new argument for extending the immunity to property and income taxes.

1. The threat of a second income tax at taxpayer's domicile merely raises the long-time question of whether due process prohibits more than a single situs for the taxation of income; it does not.

Stockham has contended that subjecting its entire net income to taxation, though fairly apportioned among all the states in which it operates, exposes its entire net in-

come to a second tax in that its entire net income is also subject to taxation by the state of its domicile or principal place of business.

As shown, the threat of multiple taxation under the commerce clause assumes that a franchise or gross receipts tax is involved; it is one of the reasons for condemning franchise and gross receipts taxes on interstate commerce and not a reason for condemning property or net income taxes which fall upon those engaged in interstate commerce.

In **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), the Court unequivocally upheld the right of a state to impose its income tax upon a non-resident's income derived from sources within the state. This was against the contention that, under due process, the income could only be taxed at the state of the taxpayer's domicile.

Subsequently, in **Lawrence v. State Tax Commission**, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102 (1932), the Court held that, under due process, the state of domicile could tax the entire net income of its residents wherever earned.

Of course, **Lawrence** was not decided in ignorance of what had been decided in **Shaffer v. Carter**. Indeed, the decision, for purposes of taxable situs under due process, equated a tax on income with a tax on intangible property when it rejected the application of **Union Refrigerator Transit Co. v. Kentucky**, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150 (1905), and **Frick v. Pennsylvania**, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058 (1925).

Due process does not prohibit more than a single situs for purposes of taxing intangible property. **Wheeling Steel Corp. v. Fox**, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936); **Curry v. McCanless**, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939); **State Tax Commission v. Aldrich**, 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358 (1942).

Although the Court in its decision in **Lawrence** created the prospect of multiple taxation of income, it, at the same time, decided that due process is not violated thereby.

2. **If the commerce clause prohibits more than an apportioned tax on the total net income derived from interstate commerce the state of domicile or principal office would be required to yield to the state or states of the source.**

The Court in **Standard Oil Co. v. Peck**, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427 (1952), indicated that the commerce clause does prohibit more than an apportioned tax on the total movable property of an instrumentality of commerce. There the Court (Mr. Justice Douglas) said:

> "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of the domicile. [citations omitted] Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." (pp. 384-85)

It may be that this, as applied to an income tax, throws doubt upon **Lawrence** and makes it now uncertain whether income will be dealt with as analogous to intangible property as in that case, or as analogous to movable tangible property as in **Standard Oil Co. v. Peck.** In either event, there is no question as to the right of the state of the source of income to tax, which is the right under which the State of Georgia claims jurisdiction to tax an apportioned part of Respondent's net income in this case.

3. **As among states from which income is derived, a fair apportionment formula precludes multiple taxation of the total net income.**

The use of apportionment formulas to effect a fair administration of state taxing laws as required by due proc-

ess is long and well established in both property taxation, **Pullman's Palace Car Co. v. Pennsylvania**, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891); **Ott v. Mississippi Valley Barge Line Co.**, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949); and **Braniff Airways, Inc., v. Nebraska**, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1954); and income taxation, **Underwood Typewriter Co. v. Chamberlain**, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920); **Butler Bros. v. McColgan**, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942).

Manifestly, it is logically impossible to have the same income taxed twice when all portions cannot exceed the whole. Practically it could happen for two reasons: (1) Apportionment formulas are only prima facie fair and the burden is upon the taxpayer to plead and prove their unfairness; conceivably, then, more than 100% could be subjected to income taxation because of the failure of the taxpayer to carry this burden. (2) The make-ups of apportionment formulas used by the various income-taxing states may, and do, vary; this conceivably can produce, in some degree, multiple taxation of the same income, but uniformity along this line among the several states is a matter for legislative, not judicial solution.

Taxation, it has been said, is a practical matter. Taxpayers have protection under **Hans Rees' Sons v. North Carolina**, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931), from an apportionment formula which fails to give full consideration to important income-producing factors. It may be that formula uniformity among income-taxing states is a desirable thing. The National Tax Association has been working for years on such a project. However, the nature of the problem, with all of its complexities, suggests that any solution of this type ought to come from Congress. In some respects the problem is similar to the problem of taxing national banks. For years Congress has regulated state taxation of national banks and offered to

the states certain optional methods of taxation.[11] Until the problem becomes serious enough to warrant Congressional action, the rule of apportionment, as authorized and limited by the Court over the years since **Pullman's Palace Car**, seems adequate.

4. The burden of keeping records and filing returns as required by the laws of the various states in which income is derived is no more than an incidental burden on interstate commerce.

Stockham has also complained of the burden which falls upon those engaged in interstate commerce with respect to keeping records and filing returns in the numerous jurisdictions over the entire United States which have authority to and do impose taxes on net incomes.

Undoubtedly it is an inconvenience and expense to comply with the different laws, tax and otherwise, of the various states and political subdivisions in which a nation-wide enterprise chooses to do business. We do not hesitate to admit that in economic burden the Georgia income tax is actually something in excess of the statutory four per cent. rate. However, the Court has made it clear that it is not the economic burden on interstate commerce which determines invalidity under the commerce clause. As the Court said in **Spector**:

> "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so" (p. 608).

Since a net income tax is a constitutional channel, the incidental expense entailed in having to keep appropriate records and file returns is hardly enough to make it a direct burden which the commerce clause forbids.

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[11] Beginning with the National Bank Act, 13 Stat. 111 (1864); presently codified, as amended, in 12 U. S. C., § 548.

CONCLUSION.

Petitioner believes that every contention of Respondent is answered by the combination of **United States Glue Co. v. Town of Oak Creek**, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918); **West Publishing Co. v. McColgan**, 328 U. S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603 (1946), affirming per curiam the Supreme Court of California, 27 Cal. 2d 705, 166 P. 2d 861 (1946); **Shaffer v. Carter**, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920); **International Shoe Co. v. Washington**, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and **Butler Bros. v. McColgan**, 315 U. S. 501, 67 S. Ct. 701, 86 L. Ed. 991 (1942). More particularly, all contentions advanced by Respondent were answered in one decision by the Supreme Court of California in its **West Publishing** decision, which this Court affirmed per curiam.

It is true that the tax involved in **West Publishing** was a "second structure" income tax, that is, a separately enacted tax on net income complementary to a franchise tax measured by net income and designed to cover taxpayers otherwise immune from the franchise tax. The Georgia income tax, as shown, is not a "second structure" income tax. Whether a "second structure" income tax should be accorded treatment as a general net income tax or treatment as a franchise tax is before this Court in other cases but not in this case. This much is clear: the "second structure" tax involved in **West Publishing** was treated by both this Court and the Supreme Court of California as a general net income tax.

It has been the purpose of our argument to show that **West Publishing**, with respect to a general net income tax, was soundly decided on principles basic to income taxation, and was in nowise dependent upon the dictum of Mr. Justice Stone in **Memphis Natural Gas Co. v. Beeler**, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942), which was re-

jected in footnote 6 of the majority opinion in **Spector Motor Service, Inc., v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951).

Indeed, **Spector** is no departure from established doctrine; it is but a more modern counterpart of **Ozark Pipe Line Corp. v. Monier**, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (1925), and **Alpha Portland Cement Co. v. Massachusetts**, 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (1925), both of which were decided after **U. S. Glue** and before **West Publishing** and have had no such effect as is contended here should follow from **Spector**. In **Alpha Portland Cement**, Mr. Justice McReynolds said:

> "The right to lay taxes on tangible property or on income is not involved; . . ." (p. 216)

His answer then is our answer now to any contentions that **Spector** has changed constitutional doctrine with respect to a general income tax. The real significance of **Spector** is that it did not change constitutional doctrine; the development begun by Mr. Justice Stone to convert the franchise tax into a constitutional channel of taxation on interstate commerce like the general income tax was stopped short by that decision.

The general income tax is a basic source of revenue for many states as it is for the federal government; at the state level, it has largely supplanted the general property tax. This Court, for forty years, has recognized it as a constitutional channel by which states can require interstate commerce to pay a fair share of the expenses of state government; this recognition stems from basic principles of income taxation altogether different from principles of franchise taxation. There are problems, to be sure, but the effort of the states to raise revenue by means of a general income tax ought to be spared the "tangled underbrush of past decisions" which has characterized franchise taxation.

A reversal of the decision of the Supreme Court of Georgia is respectfully requested.

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APPENDIX.

1. **Section 92-3101 of the Code of Georgia of 1933**, the same being also Section 3 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., pp. 24, 26), as amended and in effect during the years involved in this case:

> **Rate of taxation of individuals.**—A tax is hereby imposed upon every resident of this State, which tax shall be levied, collected and paid annually with respect to the entire net income of the taxpayer as hereinafter defined; and upon every non-resident with respect to his entire net income not hereinafter exempted, received by such taxpayer from property owned or from business carried on in this State; computed at the following rates:

2. **Section 92-3113 of the Code of Georgia of 1933**, the same being also Section 15 of the Income Tax Act of 1931 (Ga. Laws 1931, Ex. Sess., pp. 24, 34-36), as amended (Ga. Laws 1950, pp. 299, 300-303) and in effect during the years involved in this case:

> **Corporations, allocation and apportionment of income.**—The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce.

If the entire business income of the corporation is derived from property owned or business done in this State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on that portion of the business income which is reasonably attributable to the property owned and business done within the State, to be determined as follows:

(1) Interest received on bonds held for investment and income received from other intangible property held for investment are not subject to apportionment. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are also not subject to apportionment. All expenses connected with the interest and rentals realized from such investments are likewise not subject to apportionment but must be applied against the investment income. The net investment income from intangible property shall be allocated to Georgia if the situs of the corporation is in Georgia or the intangible property was acquired as income from property held in Georgia, or as a result of business done in Georgia. The net investment income from tangible property located in Georgia shall be allocated to Georgia.

(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation nor for sale in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State, or intangible property having an actual situs or a business situs within

the State. Otherwise such gains shall be allocated outside the State.

(3) Net income of the above classes having been separately allocated and deducted, the remainder of the net business income shall be apportioned as follows: Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax should be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such sources: Provided, that the taxable situs of intangible property held or owned by any domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

(4) Where income is derived from the manufacture, production, or sale of tangible personal property, the portion of the net income therefrom attributable to property owned or business done within this State shall be taken to be the portion arrived at by application of the following:

Three Factor Ratio.

(a) **Average inventory ratio.**—The ratio of the average of the monthly inventories of all products held in this State for sale, lease or other distribution or use in connection with the trade or business of the taxpayer during the taxable year to the average of the total monthly inventories of all products held every-

where for sale, lease or other distribution in connection with the trade or business of the taxpayer. The term "products" shall include goods, wares and merchandise of every character and kind, whether owned by the taxpayer or held on consignment or otherwise, but shall not include unrecovered or unextracted natural resources, raw materials, or goods in process of manufacture.

If the taxpayer shall fail to keep its records so as to disclose the information necessary to apply the foregoing ratio, the Commissioner shall determine the same from such information as may be available.

(b) **Salaries and wages ratio.**—The ratio of all salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in this State for services performed in connection with the trade or business of the taxpayer during the taxable year to the total salaries, wages, commissions, and other compensation paid or incurred by the taxpayer in connection with its entire trade or business, wherever conducted, during the taxable year. For the purposes of this section, all salaries, wages, commissions and other compensation paid to residents of Georgia shall be deemed to have been paid or incurred in this State, irrespective of the place of actual payment.

(c) **Gross receipts ratio.**—The ratio of gross receipts from business done within this State to total gross receipts from business done everywhere. For the purposes of this section receipts shall be deemed to have been derived from business done within this State only if received from products shipped to customers in this State, or delivered within this State to customers, and in determining the gross receipts within Georgia, receipts from sales negotiated or effected through offices of the taxpayer outside the

State and delivered from storage in the State to customers outside the State shall be excluded.

(d) The average inventory ratio, the salaries and wages ratio, and the gross receipts ratio shall be separately determined and the three percentages averaged, and the net income of the corporation allocated and apportioned to Georgia according to such average.

(e) For the purposes of this section, the word "sale" shall include exchange, and the word "manufacture" shall include the extraction and recovery of natural resources and all processes of fabricating and curing.

(5) Where income is derived from business other than the manufacture, production or sale of tangible personal property, or from the holding or sale of intangible property, the net income shall be equitably apportioned within and without the State under rules and regulations of the State Revenue Commissioner, in the ratio that the business within the State is to the total business of the corporation.

(6) The net income of a domestic or foreign corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership shall be determined by eliminating all payments to the parent corporation or affiliated corporation in excess of fair value, and by including fair compensation to such domestic business corporation for its commodities sold to or services performed for the parent corporation or affiliated corporation. For the purposes of determining such net income the Commissioner may equitably determine such net income by reasonable rules of apportionment of the combined income of the subsidiary, its parent and affiliates or any thereof.

3. **Section 92-2401 of the Code of Georgia of 1933**, the same being also Paragraph 43 of Section 1 of the General

Tax Act of 1935 (Ga. Laws 1935, pp. 11, 25); as amended (Ga. Laws 1951, pp. 157, 167; 1952, pp. 371, 372) and in effect during the years involved in this case:

> **Corporations, domestic and domesticated foreign.**—All corporations incorporated under the laws of Georgia, except those that are not organized for pecuniary gain or profit, and domesticated foreign corporations, in addition to all other taxes now required by them by law, are hereby required to pay each year an annual license or occupation tax as specified in the following scale: . . .

4. **Section 92-2403 of the Code of Georgia of 1933**, the same being also Paragraph 44 of Section 1 of the General Tax Act of 1935 (Ga. Laws 1935, pp. 11, 28) and in effect during the years involved in this case:

> **Foreign corporations.**—All corporations incorporated or organized under the laws of any other State, Territory, or Nation, doing business or owning property in this State, except those not operated for pecuniary gain or profit, in addition to all other taxes now required of them by law, are hereby required to pay each year an annual license or occupation tax for the privilege of carrying on their businesses within this State, as specified in the following scale: . . .

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

No. 33

T. V. WILLIAMS, as State Revenue Commissioner,

Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No. 763

T. V. WILLIAMS, as State Revenue Commissioner,

Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, STOCKHAM VALVES & FITTINGS, INC., contends that the decision of the Supreme Court of Georgia is correct. Because of the importance of the issues raised by this case, however, and because similar issues are now before this Court in *Northwestern States Portland Cement Co. v. Minnesota*, October Term 1957, No. 606, respondent does not oppose the granting of a writ of certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The judgment of the Superior Court of Fulton County, Georgia, and the opinion and judgment of

the Supreme Court of Georgia are properly set forth in Appendix A of the Petition.

JURISDICTION

Respondent concedes that the Supreme Court has jurisdiction of this matter.

QUESTION PRESENTED

The question presented is whether or not the State of Georgia may collect its general net income tax from respondent, whose connection with Georgia is limited to the activities of its sales representative and the operation of its sales service office, all of which activities are an integral part of interstate commerce without:

(a) violating the commerce clause of the Constitution of the United States; and

(b) violating the due process clause of the Constitution of the United States.

STATUTES INVOLVED

The constitutional provisions and statutes involved are properly set forth in the Petition, pages 3-4.

STATEMENT OF THE CASE

The case was tried on an agreed Stipulation of Facts which is clear and concise. The stipulation appears in the Record before this Court. (R. 2-13).

The issues involved may be clarified by slightly expanding the statement of facts which appears in the Petition.

Respondent is a Delaware corporation which manufactured valves and pipe fittings at its plant in Alabama. (R. 2). It was not qualified to do business in Georgia. (R. 9).

Respondent maintained a sales service office in Atlanta, Georgia. (R. 3). This office was used as headquarters for its sales representative who spent approximately one-third of his time in Georgia. (R. 6). One secretary was employed at the Atlanta office. (R. 6). The sales representative called on the trade in several states, attempted to get new customers, attempted to increase the sale of respondent's products, and promoted good will. (R. 7-8). Orders which he received were forwarded to the home office in Alabama where they were either accepted or rejected. (R. 5). All shipments of goods to customers in Georgia were made f.o.b. the plant or warehouse outside of Georgia. (R. 5). Less than two per cent of respondent's sales were made to customers in Georgia. (R. 10-12).

In short, respondent operated a district sales service office in Atlanta, Georgia, in a manner typical of the distribution system adopted by large numbers of interstate business concerns.

Based on these facts alone, Georgia sought to collect its general income tax from respondent.

In petitioner's Statement of Case, there are several assertions which are argumentative in nature, but it is not believed necessary to point to them in detail here.

REASONS WHY RESPONDENT DOES NOT OPPOSE GRANTING OF THE WRIT

The total amount of taxes involved in this case is less than $1,500. While respondent does not minimize

the amount involved, it is obvious that this extensive and expensive litigation cannot be economically justified unless respondent can thereby obtain permanent relief from the tax in question. Respondent believes that in view of the similarity suggested by the petitioner between this case and *Northwestern States Portland Cement Co.* v. *Minnesota*, ... Minn. ..., 84 N. W. 2d 373 (1957) (*probable jurisdiction noted by this Court*, No. 606), denial of certiorari in this case prior to a review of the *Minnesota* case would not deter Georgia from enforcing and collecting this tax in the future. In other words, should this Court deny certiorari in this case and thereafter affirm the decision of the Supreme Court of Minnesota in the *Minnesota* case, respondent believes that petitioner would continue to enforce and collect this particular tax, even though there are some significant differences between the two cases. Thus, the mere denial of certiorari in this case will not afford respondent the permanent relief it seeks from this burdensome tax.

Further, respondent operates sales service offices in nine states and the District of Columbia. Its sales representatives regularly carry on their activities in every state of the Union. Until quite recently only one or two states made any attempt to levy their income taxes on respondent or companies which operated in a similar manner. Now, more and more states are attempting to collect their income taxes because of the activities of respondent's sales representatives. These diverse, cumulative and inconsistent state exactions have become a most serious problem. Since denial of certiorari would not amount to an affirmance of the decision of the Supreme Court of Georgia, respondent

would in all probability continue to be taxed by the other states.

After this Court's decision in *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), the several states have been divided in their interpretation of the commerce clause. Georgia, in the instant case, and Pennsylvania, in *Pennsylvania* v. *Eastman Kodak Co.,* 385 Pa. 607, 124 A. 2d 100 (1956), have held that net income taxes may not be collected from taxpayers all of whose activities are a part of interstate commerce. Minnesota, in *Northwestern States Portland Cement Co.* v. *Minnesota, supra;* and Louisiana, in *Fontenot* v. *John I. Hay Co.,* 228 La. 1031, 84 So. 2d 810 (1955), have held substantially to the contrary.

The Supreme Court of Georgia has carefully construed its income tax statute and has rendered a forthright and correct decision. Factual peculiarities of the *Minnesota* case are absent here. The Court not only held that the statute violated the commerce clause, but, in addition, it held that to impose an income tax on a company having such minimal contacts with Georgia violated the federal due process clause. On the latter issue, particularly, the facts of the instant case differ widely from the *Minnesota* case.

Unless the United States Constitution protects companies whose only connection with the taxing state is through their sales organizations from the burdensome income taxes which the several states are attempting to impose, respondent and many other small and medium-size businesses may be forced to curtail their free trade in the several states. As the Supreme Court

of Georgia has held, these taxes are precisely the sort of economic barriers which the federal constitution was and is designed to prevent.

We believe that this case, based as it is on an agreed stipulation of facts, presents the constitutional questions clearly and simply. Further, as stated above, we believe that there are differences between this case and the *Minnesota* case of a degree that should result in affirmance of the decision of the Supreme Court of Georgia in this case, whatever may be the outcome in the *Minnesota* case. So as to afford respondent an opportunity to (1) present its arguments on these important constitutional questions in a clear-cut case, and (2) point out to the Court the important differences between this case and the *Minnesota* case, respondent does not oppose the granting of the writ.

We will reserve comment on petitioner's legal arguments until this Court has ruled on the Petition.

CONCLUSION

For the foregoing reasons, respondent does not oppose the Petition for a Writ of Certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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No. 33

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

No. 33

T. V. WILLIAMS, as State Revenue Commissioner,

Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,

Respondent.

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 28-38) is reported at 213 Ga. 713, 101 S.E.2d 197.

JURISDICTION

Respondent concedes that the Supreme Court has jurisdiction of this matter.

QUESTION PRESENTED

The question presented is whether or not the State of Georgia may collect its general net income tax from respondent, whose connection with Georgia is limited to the activities of its sales representative and the operation of its sales service office in Atlanta, all of which activities are an integral part of interstate commerce:

(a) without violating the commerce clause of the Constitution of the United States; and

(b) without violating the due process clause of the Constitution of the United States.

STATUTES INVOLVED

The constitutional provisions and statutes involved are properly set forth in petitioner's brief, pages 3-4.

STATEMENT

The case was tried on an agreed Stipulation of Facts which is clear and concise. The stipulation appears in the Record before this Court (R. 1-13).[1] The facts may, however, be briefly summarized.

Respondent was a Delaware corporation with its principal office and manufacturing plant located in Birmingham, Alabama. It was engaged in the business of manufacturing and selling valves and pipe fittings (R. 2). Purchasers of respondent's products were located in all of the United States. Respondent operated five regional warehouses and thirteen sales service offices. It made sales only to established local wholesalers and jobbers (except for sales to makers of automatic sprinkler systems). These wholesalers and jobbers were in no way tied in or committed to respondent by any type of license or dealership arrangement (R. 3), and they usually handled competing products (R. 4).

---

[1]References to the Record will be made in the usual manner. All italics in quoted material are added unless otherwise noted.

Respondent maintained a sales service office in Atlanta, Georgia, serving a territory comprising parts of five states (R. 5). One of its sales representatives used this office as headquarters and a woman secretary was employed there (R. 5, 6). The sales representative spent approximately one-third of his time in Georgia (R. 6).

The sales representative received orders, attempted to obtain new customers and to promote good will and in general carried on the usual activities of a salesman (R. 6-8). Any orders received by the sales representative or at the sales service office were forwarded to the Company's home office in Alabama for contractual acceptance or rejection. Some orders were rejected for credit or other reasons (R. 4, 7). All goods sold to Georgia customers were shipped on a "f.o.b. warehouse" basis (R. 5).

Except for a small amount of office furniture, equipment, supplies and advertising literature, respondent owned no property in Georgia (R. 8).

Respondent's sales representative had no authority to, nor did he accept any orders, enter into contractual obligations of any type or receive payment for goods. Respondent maintained no bank account in Georgia. All credit matters were passed on at respondent's home office and all collections were made by that office (R. 4, 9).

Except for the shipment of goods to customers in Georgia, the activities of respondent's sales representative and the operation of its sales service office in Atlanta, respondent had no connection with the State of Georgia.

The petitioner levied a net income tax against respondent based on the following provision of law:

> "The tax imposed by this law shall apply to the entire net income, as herein defined, received by every corporation, foreign or domestic, owning property or doing business in this State. Every such corporation

> shall be deemed to be doing business within this State *if it engages within this State in any activities or transactions for the purpose of financial profit or gain,* whether or not such corporation qualifies to do business in this State, and whether or not it maintains an office or place of doing business within this State, *and whether or not any such activity or transaction is connected with interstate or foreign commerce.*[1]

After deciding that respondent's activities in Georgia were covered by that definition, the petitioner determined the portion of respondent's income attributable to Georgia by applying a three factor ratio based on inventory, wages and gross receipts (R. 9-12). Respondent paid income taxes on the portion of its income so allocated to Georgia and duly filed claims for refund. Upon denial of these claims, suits for refund were filed. The trial court ruled against respondent (R. 13, 14). The Supreme Court of Georgia held that the Georgia income tax law as applied to respondent violated both the commerce clause and the due process clause of the federal constitution and reversed the trial court (R. 28-38). This Court granted certiorari (R. 39).

---

[1]GA. CODE ANN., § 92-3113 (Supp. 1955).

SUMMARY OF ARGUMENT

Commerce Clause

1

All of respondent's activities within Georgia are directly connected with the interstate sale of its products. Such activities are carried on by its sales representative, or through the Company's sales service office in Atlanta where one secretary is employed. All of such activities are an integral part of interstate commerce. *Cheney Brothers Co. v. Massachusetts,* 246 U. S. 147 (1918).

2

Solely because respondent engages in interstate commerce in Georgia, it is required to pay the general state income tax. Since it engages in no local activities whatsoever, the tax is necessarily levied for the privilege of engaging in interstate commerce or it is levied on interstate commerce itself. Under either construction, the tax is a prohibited burden on interstate commerce. *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951).

3

Historically, interstate business has not been required to pay state income taxes solely on account of sales activity. Manufacturing companies, and particularly smaller companies, generally have manufacturing plants, offices where business is transacted, or warehouses in only a few states. Selling activity must, however, be carried on where the customers are located. Sales are not, nor can they be localized. Payment of net income taxes in every state in which a company carries on sales activity would be a tremendous burden on interstate commerce. The burden will be even greater because, as a practical matter, many apportionment formulae discriminate against foreign corporations.

The dictum appearing in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), and the dicta appearing in subsequent cases are no longer persuasive. In those cases the taxpayers were engaged in manufacturing operations or other substantial local activity within the taxing jurisdiction. In view of the current rates of corporate income taxes and the high cost of complying with a multitude of different laws, the suggestion that a net income tax does not burden exclusively interstate commerce is not tenable. *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), dealing with exports, and *Graves* v. *New York* ex rel. *O'Keefe*, 306 U. S. 466 (1939), dealing with taxes on salaries of government employees, are not in point.

Due Process Clause

5

The due process clause prohibits the taxation of a foreign corporation unless the corporation carries on substantial activities within the taxing jurisdiction. A sales representative's presence within the state for one-third of his time and the employment of one secretary at a sales service office is not a sufficient connection with the state to permit the imposition of a general income tax. *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954).

6

The degree of activity which will subject a corporation to the jurisdiction of a state varies, depending on the particular obligation which the state seeks to impose on the corporation. Very slight activity will justify a suit on a contract which bears direct relation to the state. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957). Relatively slight connections will support taxes on transactions which actually occur within the state, such as unemployment com-

pensation taxes based on employees' salaries earned within the state, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), or taxes on sales, *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335 (1944).

Respondent's activities in Georgia are not, however, sufficient to subject it to a general income tax measured by a portion of its over-all profit which is related only indirectly, if at all, to respondent's activities in Georgia.

ARGUMENT

I

COMMERCE CLAUSE

1. All of respondent's activities within the State of Georgia are a part of and inseparable from interstate commerce and any income tax assessed against respondent is a direct burden on such commerce and violates the Commerce Clause of the Federal Constitution.

(A) ALL OF RESPONDENT'S GEORGIA ACTIVITIES CONSTITUTE INTERSTATE COMMERCE.

All of respondent's activities in Georgia related directly to the interstate sale of its products. It operated a sales service office in Atlanta (R. 5). One of its traveling sales representatives used that office as headquarters (R. 6). One woman secretary was employed in that office and a small amount of office furniture was maintained there (R. 5, 8). The representative carried on the ordinary duties of a salesman in Georgia (R. 6-8). No orders were, however, accepted in Georgia (R. 4). All sales were made on a "f.o.b. warehouse" basis and were completed at warehouses outside of Georgia by deliveries to customers or to common carriers consigned to customers (R. 5). All such sales took place outside of Georgia. *Parke, Davis & Co.* v. *Cook*, 198

Ga. 457, 31 S.E.2d 728 (1944); *appeal dismissed*, 323 U. S. 681 (1945).

Respondent had no other connection whatsoever with the State of Georgia.

Undoubtedly all of respondent's activities are an integral and inseparable part of interstate commerce. This Court has held that activities of this nature are interstate commerce in a situation where taxpayer had more local connections with the taxing state than in the instant case. *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147 (1918). There the Court briefly stated the facts as follows (p. 153):

> "This is a Connecticut corporation whose general business is manufacturing and selling silk fabrics. It maintains in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State."

The Court held (p. 153):

> "We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that busi-

ness is carried on and share its immunity from state taxation. . . . We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause."

The line of cases which limits the right of a state to impose license taxes on salesmen representing interstate concerns makes it clear that there is no local incident which may be carved out of the salesman's duties sufficient to support a tax on the interstate concern. As the Court recently said in *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 393 (1952):

> "Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. *As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'*"

> "If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608-609 (1951), and cases cited therein."

Also see *Nippert* v. *Richmond*, 327 U. S. 416 (1946); *Robbins* v. *Shelby Taxing District*, 120 U. S. 489 (1887).

The stipulation states that all of respondent's orders were accepted or rejected at its home office in Alabama and delivery made f.o.b. warehouse outside Georgia to the customer or to common carriers for shipment to the customer (R. 4-5). Respondent's only activity within the State of Georgia consisted of the operation of its Atlanta sales serv-

ice office and the activities of its sales representative. Under the foregoing authorities, it is well settled that all of such activities are an integral part of interstate commerce. The case, therefore, narrows itself to the proposition:

(B) A State May Not Impose an Income Tax on Interstate Commerce Where the Taxpayer Engages in no Local Activities Whatsoever.

The fundamental limitations of the commerce clause on state taxation were established many years ago by this Court. They were well stated in *LeLoup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888):

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Although the guiding principles were established by this Court soon after the founding of the Republic and have been consistently adhered to, it is difficult, if not impossible, to reconcile all of the various decisions on this complex subject. In this mass of decisions dicta can be found to support almost any conceivable position. It will be our effort here to point out the cases most nearly controlling in their factual patterns and to emphasize particularly the more recent decisions of this Court.

The recent decision most nearly controlling in the instant case is *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). There taxpayer operated a freight line which picked up freight in Connecticut for delivery outside the state and delivered freight from outside the state to cus-

tomers in Connecticut. The Court held that taxpayer's terminal activities, pick-up service and other activities incident to the transportation of freight were integral parts of interstate commerce. The Court found that taxpayer engaged in no intrastate activities whatsoever. As the Court said (p. 606): "*The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation.*" The tax in question had been construed by the Supreme Court of Connecticut as an "excise upon the franchise of corporations for the privilege of carrying on or doing business in the state" measured by net income reasonably attributable to the state.[1] This Court accepted that construction. The tax did not discriminate against interstate commerce, nor was the method of allocating a share of taxpayer's income to Connecticut unreasonable. The sole issue in the case was whether or not such a tax computed by petitioner's net income could be assessed against a business which was engaged exclusively in interstate commerce. The Court said (p. 609):

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (measured by percentages of 'corporate excess' and net income); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co.* v. *Stone*, 337 U. S. 662, 669, et seq. (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Freeman* v. *Hewit*, supra." (Emphasis by the Court).

[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 606 (1951).

There is no possible distinction between the *Spector* case and the instant case unless reliance is to be placed solely on a matter of labels. When the *Spector* case was before the Court of Appeals for the Second Circuit, it discussed the question of whether or not the issue was one of labels or one of substance, as follows:[1]

> "The tax would certainly be the same under various other labels, *such as a net income tax,* a corporation business tax, or what not. The label as chosen seems obviously designed to express the purpose and the fair rationale behind the state's revenue program; it would be ironic were this to be held to defeat the tax as against, say, the cruder tax upheld in the Interstate Oil Pipe Line Co. case. *If anything, the label here should be an aid, rather than a drawback, to its view in proper perspective.*"

This Court itself stated that it was not dealing with a matter of labels. It said (p. 608):

> "The answer in the instant case has been made clear by the courts of Connecticut. *It is not a matter of labels.* The incidence of the tax provides the answer."

Realistically, there can be no difference between a franchise tax measured by net income and a net income tax. The tax is precisely the same amount. It is collectible in precisely the same way. It has precisely the same economic effect on the taxpayer. Unless the Court is willing to say that use of the word "*franchise*" is the sole and only basis for distinction, then we respectfully submit that this case is controlled by the *Spector* case and that the Georgia income tax must be held to impose a direct burden on interstate commerce.

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[1] *Spector Motor Service* v. *O'Connor,* 181 F. 2d 150, 156 (2nd Cir. 1950).

Except for *Spector*, no other decision of this Court rules on the question of whether or not a state may impose a tax measured by net income on a business engaged exclusively in interstate commerce. We do not understand petitioner to claim that there is such a decision.

We will admit that dicta from some cases decided in the Nineteen Thirties tend to support the proposition that an income tax is valid. A number of earlier cases, however, clearly indicate that a net income tax on exclusively interstate commerce is invalid, and these earlier decisions, rather than those of the Nineteen Thirties, involve more nearly analogous factual situations. As the Court recently said:[1]

> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925), a Massachusetts excise tax based on the proportion of a company's assets employed in the state *and the proportion of its net income derived in the state* was held unconstitutional as applied to a taxpayer engaged exclusively in interstate commerce. Taxpayer maintained a branch sales office in Massachusetts which was used as headquarters by its traveling salesmen. It owned office equipment there and its local manager handled petty cash items for the company through a bank account maintained in his own name. The Court found that all of taxpayer's activities were an integral part of interstate commerce and therefore held the excise unconstitutional.

The Court said (p. 218):

"The local business of a foreign corporation may

[1] *Freeman* v. *Hewit*, 329 U. S. 249, 252 (1946).

support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, approved *such an excise measured by income reasonably attributed to intrastate business;* but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. *Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State.* Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business."

"Local business was a sufficient basis for the excise" [a net income tax] in *Underwood*, which is discussed in more detail, *infra*, page 43, but what basis is there for the income tax Georgia seeks to collect? There is no basis for the tax except interstate commerce, because all of respondent's business in Georgia is interstate commerce. It had no local business.

Further, *Alpha Portland Cement* lays to rest any contention that a net income tax on interstate commerce may be upheld solely because it is not a condition precedent to doing the interstate business. This Court said that, "of course," it "does not support the suggestion. . . ." If an excise tax measured by net income is not a condition precedent to doing business, then the only difference between it and a net income tax is one of labels. Both taxes are a certain percentage of net income. Both are payable in the same manner with the same money at the same time. The only difference is one of names.

A franchise tax "for the privilege of exercising its corporate franchises within this state, *a tax according to or measured by its net income,*" was before this Court in

Matson Navigation Co. v. *State Board*, 297 U. S. 441 (1936). Taxpayer did some intrastate business. The statute exempted from taxation all taxpayers who were engaged exclusively in interstate commerce. Taxpayer contended that this exemption was arbitrary and unreasonable and violated the equal protection clause of the Federal Constitution. In dealing with this contention, this Court held (p. 446):

> "There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants. *A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, 216 et seq., *Anglo-Chilean Nitrate Corp.* v. *Alabama*, supra. The submission by the State to the commerce clause cannot be held to violate the equal protection clause."

Also see *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U. S. 218 (1933), and *Atlantic Lumber Co.* v. *Comm'r*, 298 U. S. 553, 555 (1936).

The conclusion that a net income tax on exclusively interstate commerce is unconstitutional is strengthened by an analysis of related lines of cases. In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (1925), this Court considered an annual franchise tax which was measured by the value of the taxpayer's capital stock and surplus employed in business within the state. Taxpayer operated an interstate pipe line through Missouri, but made no pick-ups or deliveries in Missouri. Taxpayer's main offices, home office personnel, trucks and compressor stations were located in Missouri. The court said (p. 565):

> "*The business actually carried on by appellant was exclusively in interstate commerce.* The maintenance of an office, the purchase of supplies, employment of

labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. *The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected.*"

The Court proceeded to hold the tax unconstitutional.

This Court has consistently held that a state may not impose a license tax on interstate commerce. The limits of a state's authority to impose license taxes were very clearly stated in *Cooney* v. *Mountain States Tel. and Tel. Co.*, 294 U. S. 384 (1935), where a license tax on telephones was at issue. The Court said (p. 393):

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax;* and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

More recently in *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957), this Court invalidated a city license tax, saying (p. 391):

> "We held in *Nippert* v. *Richmond*, 327 U. S. 416, and in *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*,

342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce. In our opinion the tax here in question falls squarely within the ban of those cases."

Attempts to impose gross receipts taxes on businesses engaged in interstate commerce have also given rise to a great deal of litigation. It is settled that such taxes as applied to interstate commerce constitute a direct burden on such commerce and are unconstitutional. *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954). In question there was the Virginia gross income tax as applied to Railway Express, all of whose activities within the State of Virginia were a part of interstate commerce. The Court said (p. 367):

"It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate move-*

ment are not adequate grounds for a state license, privilege or occupation tax."

The first case cited by the Supreme Court in support of the foregoing statement was *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). As hereinbefore discussed, the *Spector* case involved a tax measured by net income from interstate commerce.

The validity of gross income taxes was discussed at great length by this Court in a very close decision rendered a few years prior to the *Railway Express* case. *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949). Mississippi imposed an "annual privilege tax . . . equal to 2% of the gross income" upon persons operating a pipe line for transportation of gas from one point to another within the State of Mississippi. Taxpayer collected gas in its pipe lines within the state and delivered the gas to railroad terminals, whence it was shipped outside the state. Four Justices of this Court were of the opinion that the tax was valid whether or not taxpayer was engaged in interstate commerce. A fifth Justice was of the opinion that no interstate commerce was involved and therefore voted to uphold the tax. Four Justices, however, dissented, taking the view that taxpayer's activities were exclusively in interstate commerce and that the tax as applied to interstate commerce was invalid. Since the *Railway Express* case holds that a fairly apportioned gross income tax applied to exclusively interstate commerce is unconstitutional, and since the *Interstate Oil Pipe Line* dissenting opinion was recently cited with approval by a majority of the Court in *Spector*, it is entitled to great weight.

Justice Reed, speaking for the minority in the *Interstate Oil Pipe Line* case, said (p. 677):

> "The cases hold not only that a state may not exact a tax as a condition precedent to the doing of interstate business, but also that it may not levy privilege, *excise*

or franchise taxes *on a foreign corporation for* the privilege of carrying on *or the actual doing of solely interstate business after its admission to the state.*"

and added in a footnote:

"Since we perceive no difference for the purposes of this case between franchise, privilege, and *excise taxes*, insofar as they are exacted for the privilege of doing *or the doing of interstate business*, we have treated them as identical as far as their validity under the commerce clause is concerned. In *Ozark* and *Anglo-Chilean Nitrate* the taxes were called franchise taxes; in *Alpha* it was labeled an excise tax."

The opinion continued (p. 679):

"Where the corporate taxpayer conducts intrastate as well as interstate business, a franchise, privilege or excise tax on the former is of course permissible. We have frequently upheld such a tax although it was measured by property or receipts which were used in or attributable to interstate business. . . ."

(p. 680): "Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce, see *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, this Court has never interpreted the commerce clause to allow a state tax for the privilege of carrying on interstate commerce or one upon that commerce itself. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422. This is not because of the financial burden. Other taxes may equally burden the commerce. It is not because in transportation the same result cannot be obtained by levying a tax for intrastate activities measured by gross receipts appropriately apportioned to the activities in the state. *It is because the commerce clause of the Constitution does not leave to the states any power to permit or refuse the carrying on of interstate commerce.* It like-

wise bars a state from taxing the privilege of doing interstate commerce *or the doing of interstate commerce, with or without fair apportionment even if not discriminatory.* . . ."

(p. 681): "All interstate commerce thus has free access to local markets, subject only to non-discriminatory taxes such as the tax on apportioned gross receipts from *intrastate* mileage as in *Central Greyhound Lines* v. *Mealey, supra,* or the tax on disconnected local incidents as discussed in the opinions in *Memphis Gas Co.* v. *Stone, supra,* or in *International Harvester Co.* v. *Evatt, supra,* or *American Manufacturing Co.* v. *St. Louis,* 250 U. S. 459. So long as a tax on the privilege of doing interstate business *or a tax on the doing of that business is prohibited,* interstate commerce remains free from state exactions levied on that commerce."

The foregoing opinion contains a keen analysis of the earlier cases and most nearly reconciles their conflicting statements. Its reasoning provides a fair and workable guide for the future. Without qualification, it rules that a state may not levy an "excise . . . on a foreign corporation for . . . the actual doing of solely interstate business. . . ."

The Supreme Court of Georgia held in the instant case that the Georgia income tax *"is in the nature of an excise tax"* (R. 35). Although writers and the courts often use loose language, a net income tax is ordinarily classified as an excise tax.[1] Basically, there are only two broad categories of taxes—property taxes and excise taxes. Thus, this Court in *Alpha Portland Cement Co.* v. *Massachusetts,*[2]

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[1]"Many, perhaps most, courts hold that a net income tax is to be classified as an excise." *Hale* v. *State Board,* 302 U. S. 95, 104 (1937).

[2]268 U. S. 203 (1925).

referred to the Connecticut net income tax as an excise tax when it said (p. 218):

> "*Underwood Typewriter* . . . approved such an *excise* measured by income reasonably attributed to intrastate business."

Respondent does nothing in Georgia except interstate commerce. Because it engages in such commerce, it must pay the Georgia income tax. Using words in their non-technical sense, respondent must pay the Georgia income tax for the privilege of doing interstate commerce in Georgia, or it must pay the tax because it engages in that commerce. To say that the tax is not levied for the privilege of doing commerce, nor is it levied on that commerce leaves nothing on which the tax can operate. Whether the excise be called a privilege tax, a franchise tax or an income tax, it has the identical effect. We urge that under the circumstances of this case any general excise measured by net income is a prohibited burden on interstate commerce.

2. State income taxes, as historically construed and administered, have not burdened interstate commerce.

The earliest state income tax on corporations is less than fifty years old.[1] Sixteen states had adopted corporate income taxes by 1929. Today, thirty-five states, the District of Columbia, and Hawaii have laws imposing net income taxes on corporations.[2] Generally speaking, no states attempted to collect income taxes from companies engaged only in sales activities until the early 1940's. California first construed its corporate income tax to apply to sales activities. Georgia has followed California's lead as have Louisiana, Minnesota, Oregon and Mississippi.

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[1] Wisconsin adopted a corporate income tax in 1911.

[2] P-H State & Local Taxes, All State Tax Guide, Par. 1046 (1958). (In addition, Indiana imposes a gross income tax on corporations).

Since so few states have attempted to collect income taxes from corporations who limited their activity within the state to the solicitation of sales, the problem is relatively new. At present the majority of companies pay income taxes in only one, two or three states. Various surveys bear out this conclusion.

The results of a recent survey conducted by the National Association of Manufacturers among its Taxation Committee are set out in detail in the *amicus curiae* brief filed herein by the Association. It will be noted that a very simple questionnaire was sent to about three hundred business concerns. Only three questions were asked. The first question asked for the company's annual gross sales. The second question asked in how many states did the "company have salesmen or did salesmen representing your company travel with some degree of regularity." The third question asked in how many states did the company "file tax returns measured by net income" during the past year. The one hundred thirty-nine replies to this questionnaire are quite revealing. Sixty-six companies paid income taxes in five states or less. Yet out of this same sample, one hundred two companies had salesmen who traveled with some degree of regularity in twenty-one or more states during the past year.

The statistics are even more revealing when one considers only the smaller companies. Of the sixty-five companies having gross annual sales of less than $25,000,000 replying to the survey, only twenty-one paid income taxes in more than three states. Only twelve companies paid taxes in more than five states. Forty-one companies paid taxes in one state or less. Yet of these same companies, thirty-seven had salesmen who traveled in more than twenty-one states with some degree of regularity during the past year.

Respondent's activities fall into the same pattern. The Record indicates that it has customers in all of the United

States. It operates thirteen sales service offices. It has plants or warehouses in only five states (R. 3). The only states in which it pays taxes measured by net income, other than Georgia, are Alabama, California and Pennsylvania (R. 11-12). In each of those states it operates a warehouse (R. 2-3). Except for the District of Columbia franchise tax, it pays no other taxes measured by net income (R. 12).

Whatever may be the reasons therefor, it is abundantly clear that as of today interstate businesses do not, nor have they ever in the history of the United States been required to pay net income taxes in a substantial number of jurisdictions. Assuming that there are more small and medium-sized companies than giant corporations, it is entirely fair to say that the vast majority of interstate businesses have not paid income taxes in more than three states. Among the small and medium-sized companies, almost none pay income taxes in more than three states.

On the other hand, the very same companies carry on regular sales solicitation in most of the United States. If this solicitation is sufficient to subject a corporation to a state's net income tax,[1] the typical corporation will be required to pay thirty-five or more state net income taxes as opposed to the present practice of paying one to three. The next section of this brief will consider the effect of such a change.

[1]No constitutional distinction has ever been drawn between the regular activities of salesmen who travel out of their homes and the same activities of salesmen who have an office in the state. *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147 (1918), and the long line of cases which follow it, hold that all such activities are part of interstate commerce and entitled to its protection.

3. If solicitation of sales alone will subject interstate commerce to state income taxes, the burden will be heavy.

Whether the imposition of income taxes by the several states amounts to a proscribed burden on interstate commerce does not depend on highly theoretical concepts. It is a very practical question. As Justice Holmes said: "Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."[1] To fix the line, one must consider the nature of state income taxes and their probable effect on commerce.

Thirty-five states, Hawaii, and the District of Columbia, levy taxes measured by net income on corporations.[2] For purposes of this discussion, we make no effort to classify various state taxes as direct net income taxes, franchise taxes measured by net income, or other forms of taxes measured by net income. It is fair to assume that if the Court upholds a general net income tax of any type, the states will rapidly amend their laws to provide the proper labels.

What effect will thirty-five income taxes have on interstate business? While there will be other effects, the most obvious one is the amount of taxes that an interstate business will be required to pay. To begin with, the state of a corporation's domicile can apparently tax 100% of its net income. As this Court said in *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 279 (1932): "domicile in itself establishes a basis for taxation."

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[1] *Galveston, H. & S. A. Ry.* v. *Texas*, 210 U. S. 217, 225 (1908).

[2] P-H State & Local Taxes, All States Tax Guide, Par. 1046 (1958).

New Jersey is included, although its income tax will not be effective until 1959.

In his brief (pp. 10, 50), petitioner recognizes the taxing power of the state of domicile, but he argues that multiple taxation of interstate commerce does not violate the Constitution. He further argues that if multiple taxation should be found to violate the Constitution, the power of the state of domicile should be limited. To support this argument he points to *Standard Oil Co.* v. *Peck*,[1] which requires apportionment of property taxes levied by the home port of a vessel moving on inland waterways. An attempt to apply the home port rule to income taxes, however, runs counter to *U. S. Glue* v. *Oak Creek*,[2] the case upon which petitioner so heavily relies. There taxpayer was a domestic corporation with its principal manufacturing plant located within the state. The question before the Court was whether or not the state could tax income derived from (a) goods manufactured in the state and sold to customers outside of the state but delivered from a factory in the state; and (b) goods manufactured in the state and "sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches'"[3] outside the state. Thus, the taxpayer not only negotiated the second category of sales outside the state, but the actual sales apparently took place beyond its borders. The Court held that the state could tax all of the net income from these sales. It is clear therefore that the solicitation of orders in foreign states does not remove any of a company's income from the grasp of the domiciliary state.

We start with the proposition, therefore, that the domiciliary state may constitutionally tax 100% of a corporation's net income. State income taxes assessed purely on account of sales activity start into the second 100%. How much would those taxes be?

In a unitary business carried on in a number of states,

[1] 342 U. S. 382 (1952).
[2] 247 U. S. 321 (1918).
[3] *Id.* at 325.

it is impossible to separate with any degree of certainty the particular activity or activities which lead to a given amount of profit. By necessity the states have been forced to adopt some type of apportionment formula in order to arrive at the portion of an interstate concern's net income which is attributable to activities within the state.

'Since there is no conclusive way to determine the weight which should be given any particular element, the courts have upheld apportionment formulae unless they are shown to be clearly arbitrary and unreasonable. In *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920), this Court found that a Connecticut taxpayer had failed to prove that an apportionment formula based solely on the location of its real estate and tangible personal property was arbitrary. In *Butler Brothers* v. *McColgan*, 315 U. S. 501 (1942), this Court considered the California apportionment formula based on an average of three ratios—tangible property, wages and gross sales. In upholding the formula, this Court said (p. 507):

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed."

In view of the liberal attitude adopted by the courts, it is not surprising that the states have adopted a wide variety of apportionment formulae.

Prentice-Hall has prepared a comprehensive chart which purports to be a guide to the ratios used to apportion net income to the states and territories which levy income taxes.[1] This chart is reproduced at page 61 of the Appendix

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[1] P-H STATE & LOCAL TAXES, All States Report Bulletin No. 34, par. 34.1, March 4, 1958. Substantially the same information is available in permanent but somewhat more complicated form. P-H STATE & LOCAL TAXES, ALL STATES TAX GUIDE, Par. 1046 (1958).

to this brief. The first three columns in the chart list the most common ratios—property, receipts and payroll. Of the thirty-five states which levy an income tax,[1] thirty-two employ a property ratio. Thirty-four states employ a gross receipts ratio. Twenty-three states employ a payroll ratio. The fourth column is denominated "others." Under that column are references to twenty-one footnotes which describe special provisions in particular state laws. The fifth column, by means of references to twenty footnotes, is a guide to the particular items of income which a corporation may allocate separately before applying the apportionment formula in a given state. Finally, there is a column which shows whether or not a state permits separate accounting for in-state activities in lieu of the apportionment formula.

The foregoing tabulation is complicated enough, but curiously, it results in an over-simplification of the problem. The great majority of the states use a property, receipts or payroll ratio, or some combination of those three. The reason for the deception is apparent when one analyzes the interpretations placed on a particular ratio by the various states.

At page 63 of the Appendix is a second chart prepared by Prentice-Hall.[2] It offers a guide to the meaning of the receipts ratio as construed by the states which use it. There are six principal ways of determining the location of a receipt. These are (1) office where the sale is negotiated; (2) location of the property at time of order; (3) place of receipt or acceptance of order; (4) location of negotiating personnel; (5) place of delivery; and (6) place

[1] Although the New Jersey income tax which becomes effective in 1959 is not included in the chart, information concerning that tax is included in the discussion which follows.

[2] P-H State & Local Taxes, All States Tax Guide, Par. 1947 (1958).

of shipment. As previously stated, thirty-four states employ a receipts ratio in allocating taxable net income. The combinations and permutations of factors used by the various states in defining the sales which are to be included in the numerator of the receipts ratio are endless. From a reference to the foregoing chart, it would appear that the average state uses two or three of the criteria mentioned above. In addition, there is a final column on the chart for other means of allocating sales which, by reference to seven footnotes, establishes other criteria in use.

An example can best illustrate what can happen with respect to one particular transaction. A salesman negotiates a sale in California, thus requiring the allocation of receipts from the sale to the numerator of the California ratio, which is based solely on the location of the negotiating personnel. The salesman's home office was located in Minnesota, which would likewise cause the receipts from the sale to be allocated to that state, which bases its formula principally upon the office from which the sale was negotiated. If the goods were shipped from Virginia, the same receipts would be included in the Virginia ratio, which requires the inclusion of all receipts from goods shipped out of Virginia. If the customer took delivery of the goods in Georgia, the same receipts would be included in the Georgia ratio, which is based on the destination theory. If the order, after being negotiated, was finally received and accepted at the company's New York office, the receipts must be included in the New York ratio, which is based on the place of acceptance of the order. If by some peculiarity the goods were located in Oregon at the time the order was received, that state could likewise include the receipts in the numerator of its ratio. It is not necessary to exhaust every possible place where receipts from a hypothetical transaction could be used in the numerator of an apportionment ratio in order to illustrate the duplication of taxes and complications involved.

Nor is the problem limited to the location of gross receipts.

Prentice-Hall has developed complicated charts[1] which attempt to correlate the various factors used by the states in opportioning wages. The first chart appears at page 65 of the Appendix and lists seven criteria which determine the wages which must be included in the numerator of the apportionment ratio. These criteria include the location of the company's local office, regional office, or home office; the time spent by the employee in the state; and the employee's mileage within the state.

The second chart (page 66 of the Appendix) covers the types of employees whose wages must be included in the payroll ratio and the types of compensation to be included. In the first category there is a division among the states as to the inclusion of officers' salaries, directors' salaries or independent agents' salaries. In the second category there is no uniformity as to the inclusion of commissions paid, bonuses, reimbursement for board and lodging and several other types of compensation. By a checkmark under "other types of compensation" opposite every state which uses a payroll factor, Prentice-Hall indicates that there are special rules in each such state.

With respect to each state which uses a payroll factor, an interstate company must, therefore, find out whether to allocate its payrolls to the office out of which the employee works or whether the payroll can only be allocated to its chief headquarters; or perhaps payrolls must be allocated on the basis of time spent by the employee in the state or based on mileage or on other factors. Thus for each state, it must break down both the numerator and denominator of the payroll ratio so as to include or exclude payments to

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[1] P-H State & Local Taxes, All States Tax Guide, Par. 1048 (1958).

officers, directors or independent agents. It must likewise, from state to state, include or exclude commissions, bonuses, reimbursement for traveling and lodging and other types of compensation. Once again, the permutations and combinations are endless.

Likewise, among the states that use a property factor, there are many variables. Georgia bases its ratio exclusively on inventory. Other states use all real estate and tangible personal property. Still other states use combinations thereof.

There is no consistency in any of the foregoing allocation procedures. Each state decides what ratios to use and then decides how to define its ratios. In the preface to the leading treatise on allocation of income in state taxation,[1] the authors describe their efforts to prepare charts covering the various state allocation formulae. After noting that the differences in the state laws far outnumbered the similarities, they continued:[2]

> "The result was that nearly every chart became little more than a mass of footnotes, wholly unrelated among themselves, like an animal with a thousand appendages, all different, and no body. Of the numerous charts that were prepared, covering every phase of the problem, only the few given in this book presented any semblance of order. It was order of some kind which the authors had tried to discover. What they found was the utter chaos which experience had warned them to expect. As far as taxes were concerned, it seemed, the states were still in the days of proud diversity under the Articles of Confederation. Interstate commerce was still plagued by the boundary lines between the states."

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[1] ALTMAN & KEESLING, ALLOCATION OF INCOME IN STATE TAXATION (2d ed. 1950).

[2] *Id.* at 3.

Out of the mass of conflicting state laws, one significant trend does, however, appear. Most states design their allocation formulae to yield maximum revenue from interstate commerce. Formulae can be heavily weighted against commerce without overstepping the bounds sanctioned by the courts. The trend in this direction is not surprising. As long ago as the earliest drummer cases, states have attempted to discriminate against interstate commerce. Corporations, and particularly interstate corporations, are still a most popular source of revenue.

Ways in which allocation formulae can be weighted against commerce are legion. For example, Georgia, which has relatively little manufacturing, uses an inventory ratio[1] rather than a ratio based on real estate and tangible property. Since it is a branch office and warehouse state, this ratio works in its favor. Further, it uses the destination theory in its gross receipts ratio.[2] All sales to Georgia customers are included in the numerator without regard to the origin of the goods, the place where the sale was negotiated, or the place where the sale took place. Georgia gets the benefit of all goods shipped into the state even though the sale may have no connection with the state.

New York has adopted a gross receipts factor based on the location of the office where orders are accepted. This weights the factor in its favor at the expense of the many concerns which have their principal sales offices located in New York City. Connecticut and other manufacturing states have used an allocation formula based solely on the location of real estate and tangible personal property.[3]

The conclusion is, therefore, inescapable that within the limits of permissible allocation formulae, interstate busi-

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[1] GA. CODE ANN., § 92-3113(4)(a) (Supp. 1955).

[2] *Id.* § 92-3113(4)(c).

[3] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).

nesses will be forced to pay net income taxes on many times their total net income.

The scholars and writers in the field of interstate commerce law have from time to time attempted to bury the "multiple burden" doctrine and substitute various other tests to determine whether or not a taxing state violates the commerce clause. Laying aside the changing verbiage used from time to time, the very heart of the question and the very reason which caused the commerce clause to be included in our Constitution was the necessity for free trade among the states. If several states may tax the profits of interstate concerns, commerce between the states will certainly be discouraged. As recently as *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954), the Court said (p. 170):

> "Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. *It would 'permit a multiple burden upon that commerce,' Joseph* v. *Carter & Weekes Stevedoring Co., supra*, at 429, for if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several States. *That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the*

States.' McLeod v. *Dilworth Co.*, 322 U. S. 327, 330-331 (1944)."

Taxation by the states and territories is not the only problem faced by interstate commerce. In several states municipalities are permitted to levy income taxes. Municipal income taxes have existed in Ohio for a number of years. A recent survey[1] indicated that thirty Ohio municipalities have income taxes presently in effect.

At its 1957 Session, the General Assembly of Ohio enacted a bill limiting the power of municipalities to levy income taxes.[2] The bill provided that no Ohio municipality could levy an income tax unless it adopted a standard method of allocation set out in the bill. This method provided that corporations doing business within and without a city should, if practical, use separate accounting to determine their profits within the municipality. If separate accounting was not practical, the bill provided an apportionment formula composed of an average tangible property ratio, a salaries and wages ratio, and a gross receipts ratio. As usual, the gross receipts ratio was quite complicated.

The City of Louisville, Kentucky, imposes a one and one-quarter per cent net income tax on all business activities carried on within the city.[3] St. Louis, Missouri, imposes an income tax at the rate of one-half of one per cent on all business or other activities conducted in the city.[4] Both of these city income taxes require annual returns.

Generally speaking, a state may delegate any or all of its powers of taxation to municipalities or other political

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[1]State Taxation of Interstate Transactions prepared for The Valve Manufacturers Association by Donovan, Leisure, Newton and Irvine, June 1, 1958 (The Grosby Press), page 68.

[2]Laws of Ohio, Regular and First Special Session 1956-1957, at 91.

[3]Louisville Ord. No. 83, Ser. 1950.

[4]St. Louis Ord. No. 47063.

subdivisions. If the states have the power to levy income taxes on foreign corporations whose only activities within the state consist of the solicitation of sales, there is nothing to prevent their delegating this same power to municipalities. Evidently this has already been done on a broad scale in Ohio. With increasing needs for revenue, more and more cities can be expected to enact income taxes. The probability of multiple taxation of interstate business will increase in direct proportion to the increase in the number of tax gatherers.

Multiple taxation is only the beginning. Just to catalogue the various criteria used to allocate income points up the tremendous burden which will result from efforts to comply with these laws. The interstate company must first obtain an analysis of the income tax laws of all the states in which it carries on sales activities. Based on these laws, it must tabulate the criteria by which income is allocated to each of those states. It must then set up record-keeping procedures so that this information will be available at the end of the year. Sales must be tabulated by origin, destination, place of goods when ordered, location of negotiating personnel, location of office out of which such personnel worked, place where order was accepted, and whatever other elements a state may consider material. This information must be tabulated with respect to every invoice so that the taxpayer can determine which sales to include in the gross receipts ratio for each state. In like manner, data for every factor used by a state in its apportionment formula must be collected and tabulated. Thus, payroll accounts must be broken down as to type of compensation and as to type of employees compensated. Average property ratios must be calculated with respect to all real and tangible personal property, with respect to intangible property and with respect to inventories. From day to day, records must be kept so that this information will be available at year-end. Accounting procedure for tabulating this data must be adopted.

At the end of the year the corporation must prepare income tax returns in each state in which it carries on selling activities. The information required on each return differs and the legal, auditing and clerical job of preparing and filing the returns, in and of itself, will constitute a tremendous burden.

Filing a return is not, however, the end of the problem. The interstate concern must look forward to periodic audits by representatives of the taxing authorities in each jurisdiction where it pays income taxes. Not only are these visits time-consuming, but the states have now adopted a practice of making the company pay the expenses of the auditor. Unless the concern pays such costs, the state threatens to subpoena all of the company's records and cause the company to produce its records in the office of the tax commissioner.

Finally, there are the costs of resolving controversies and the costs of possible litigation to prevent unreasonable state exactions.

No effort will be made to describe in detail the burden on interstate commerce which would result from the delegation of the income tax power to a substantial number of municipalities or other political subdivisions. As emphasized throughout this discussion, salesmen efficiently representing their company must travel in all the principal cities of this country. If their activities were to require the payment of an infinite number of city income taxes, each calculated by a different formula and on a different basis, the resulting burden would be inconceivable.

The burden of multiple taxation and the burden of complying with the income tax laws of thirty-five or more states and a growing number of municipalities and other political subdivisions can perhaps be borne by the huge industrial concerns of this country without significant economic effect

on their operations. Such giant companies have large legal and auditing departments. They have the latest business machines which can catalogue and produce the required information at the flick of a switch. Already, they are doing business and are taxable in a large number of jurisdictions.

It is the medium and small-sized manufacturing concerns which will be truly burdened if they are required to file returns and pay taxes in thirty-five or more states plus an indeterminate number of cities. As has been previously discussed, such companies have, up to now, limited their taxable activities to one, two or three jurisdictions. Only in rare instances do medium-sized companies maintain factories, warehouses or business offices in more than five states. Nor is any inconvenience caused to these businesses by so limiting their activities. This pattern represents the normal production, warehousing and operating practices adopted by American manufacturing companies.

An effort to concentrate sales activities would be, however, quite another matter. With modern means of transportation and communication, even small companies sell on the national market. Companies making a specialized product soon fill the demand in their immediate region and must tap the national market in order to survive. There is no feasible means of centralizing the activities of one's salesmen. They must contact the customer where he is located. Still, if volume and profits from operations in a particular jurisdiction are small, the burden of complying with state income tax laws will demand a retrenchment. Increased costs will force many of the smaller companies to abandon areas where their sales are small and concentrate on a few states nearer home. Certainly such a result is just what the commerce clause was designed to prevent.

Further, there will be strong pressures on the smaller companies to change their methods of distribution. No doubt, the tendency will be to use independent manufac-

turers' agents, wholesale distributors and other such sales outlets. Again the independence and growth of small business will be injuriously affected. Again, interstate commerce will suffer.

Since the adoption of the United States Constitution, this Court has consistently held that exclusively interstate commerce is exempt from general taxation by the states. As the Court decided at an early date, the Constitution established an area of free trade among the several states. In the one hundred eighty-two years that have elapsed since its adoption, this Court has painstakingly, case by case, hewn out a definition of this commerce. There can be no effective substitute for the definition of interstate commerce so tediously and yet so thoroughly developed by the Court. A new or different approach would be obliged to create great confusion.

One of the leading legal publishers in its State and Local Tax Bulletin of July 22, 1958,[1] pointed up the problem vividly. The Report referred to a recent decision by the North Carolina Supreme Court holding that North Carolina could levy its net income tax on a carrier involved exclusively in interstate commerce.[2] It said (p. 2):

> "FANTASTIC RESULTS—At stake is not only an incalculable future burden on all cross-state activities, but a corresponding one on the Courts themselves. If 5 out of 9 federal high court justices go along with North Carolina, in one stroke all existing landmarks, all known tests of interstate tax immunity will be wiped out completely. There will be no basis, no predictable way to draw the thin though decisive interstate

[1] P-H, STATE & LOCAL TAXES, Report Bulletin No. 3, Par. 3.1, July 22, 1958.

[2] *ET&WNC Transportation Co. v. Currie*, No. 451, decided by the Supreme Court of North Carolina on June 30, 1958 (not yet reported).

line once respected by the federal bench. Every state will have an unassailable tax claim on every penny of net income *derived in any way from sources within its borders.* The progressive multiple effects of future and back assessments are simply inconceivable. To the extent that any individual, association or corporation anywhere in the United States has tapped the markets of any state it will be accountable taxwise to that state. This will call for a veritable flood of returns, assessments, and payments in the wake of every dollar of business drawn from each state. Because of the nonuniformity of allocation and apportionment procedures in the various states, every business man will be subject to a very real burden of accounting for multiple levies, frequently on well over 100% of his income spread among the contacted states. Every 'minimum contact' with a state will be scrutinized. The slightest vestige of property, personnel (even those casually or occasionally employed), and the most fleeting, tenuous or insubstantial act or communication may supply a tax link if part of regular business. The tax target will take in every local advertising lead, directory listing and personal visitation—as well as written, telegraphic, telephonic, electronic, and other mediums of contact, productive of any business or receipts in any way tapping the markets of a state by interstate means. A road to large-scale tax-induced bankruptcy. Fantastic? What is to prevent it?" (Emphasis by the author).

We respectfully submit that the commerce clause of the United States Constitution prevents it.

4. Authorities relied upon by petitioner are not controlling.

Petitioner relies on three lines of authority. First, he cites the dictum appearing in the *U. S. Glue* case[1] and the

[1] *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918).

dicta in later cases which follow it. Secondly, he discusses the cases which hold that the inclusion of wages paid to government employees in their income for tax purposes does not amount to a tax on the government. Thirdly, he relies on *Peck & Co.* v. *Lowe*[1] which holds that federal income taxes collected from exporters do not amount to a prohibited tax on articles of export.

The idea that a net income tax on interstate commerce was not a burden on that commerce apparently found its origin in the *U. S. Glue* case. There the taxpayer was a domestic corporation with its principal manufacturing plant located in Wisconsin. The only question before the Court was whether or not Wisconsin could tax the net income derived from sales which had been negotiated and, in some instances, effected outside the state. The Court held that although the sales in question were a part of interstate commerce, Wisconsin, the domiciliary state, could include them in computing its net income tax. Rather than supporting petitioner's argument, this case would seem to suggest a contrary result. If a taxpayer's home state can tax profits from all its sales, even those negotiated outside the state, one must conclude that the process of negotiating sales is a relatively unimportant part of the company's total activities. Further, negotiating sales is an integral part of interstate commerce. If a state levies a tax solely on this relatively unimportant element of interstate commerce, it necessarily follows that such a tax is a burden on that commerce.

Moreover, in the recent case of *Freeman* v. *Hewitt*, 329 U. S. 249 (1946), this Court recognized that the taxing power permitted by the *U. S. Glue* case was only applicable to residents of a state. It said (p. 255): "It [*a state*] *can tax the privilege of residence in the State and measure the*

[1] 247 U. S. 165 (1918).

privilege by net income, including that derived from interstate commerce.'' Supporting this statement, the Court cited *U. S. Glue.*

The suggestion in *U. S. Glue* that a gross receipts tax is a direct burden on interstate commerce, whereas a net income tax merely reaches the profits from such commerce does not appear tenable when applied to the facts of the instant case. Under the rule announced in *U. S. Glue*, all of respondent's income is taxable in its home state. If Georgia may impose its income tax because of respondent's activities within the state, all of which are a part of interstate commerce, then respondent's profits will be subjected to at least two state net income taxes.

Net income taxation has reached high brackets never dreamed of by the Justices who earlier suggested the distinction between net and gross income taxes. The top federal rate on corporations is now fifty-two (52%) per cent and state rates are climbing steadily with the ever increasing demands for revenue. No longer can a court say that a tax measured by net income is indirect and as such does not burden interstate commerce. The imposition of two or three state net income taxes in addition to federal taxes will, within the foreseeable future, become confiscatory.

Petitioner argues that the distinction between net income taxes and gross income taxes suggested by the *U. S. Glue* dictum was the basis for the Court's decision in *West Publishing Co.* v. *McColgan*, 328 U. S. 823 (1946). Since this Court decided the *West Publishing* case by a *per curiam* order, reference must be made to the lower court opinion for the facts.[1] West Publishing Company resisted the imposition of the California net income tax on the ground that it was engaged exclusively in interstate commerce and, as such, not subject to taxation in California. West

[1] 27 Cal.2d 705, 166 P.2d 861 (1946).

"had four regularly employed solicitors in the state who devoted their entire time to plaintiff's business." These employees were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. These employees had space in lawyers' offices and maintained a store of books in such offices.

It is apparent from this brief statement of facts that West Publishing Company was engaged in many activities which were purely local in nature. The maintenance of a stock of goods in lawyers' offices, the receipt of payments and the collection of delinquent accounts might be treated as local incidents. None of those elements are present in the instant case.

In its *per curiam* opinion, this Court cited four cases but none of them are controlling here. Of the cases cited, we have just discussed *U. S. Glue Co.* v. *Oak Creek* and found that it was not controlling. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245 (1928), holds that a state may impose a tax for the use of its highways in addition to a tax on the sale of gasoline, even where taxpayer is involved exclusively in interstate commerce. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 656 (1942), contains, at the page cited by this Court, a statement which could be construed to permit a net income tax on interstate commerce, but cites no authority for it. The Court had just held that taxpayer was engaged in local activities, and, therefore, the statement is wholly unnecessary to the decision. This Court subsequently indicated its disapproval of this *Memphis Natural Gas* dictum in *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951). After noting that the tax imposed on Memphis Natural Gas Company was supported by intrastate activities, the Court said in *Spector* (p. 609, footnote):

> "The decision in *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, upheld a Tennessee tax on earnings of the

taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

Finally, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), deals exclusively with the question of due process since a federal statute had expressly exempted unemployment compensation taxes from the operation of the Commerce Clause.

Apparently the local activities carried on by West Publishing Company were sufficient to uphold the net income tax there involved. Respondent is involved in no local activities whatsoever and the instant case is clearly distinguishable on its facts.

The *U. S. Glue Co.* dictum has been repeated in a number of other cases. In each such case, however, the taxpayer was engaged in substantial local activities. Thus, *Atlantic Coast Line R.R.* v. *Daughton*, 262 U. S. 413 (1923), raised the question of whether or not the portion of a railroad's income allocable to North Carolina for purposes of its net income tax was reasonable. There was no question but what the railroad was carrying on substantial intrastate business within the state and nothing was at issue but the manner in which taxable income was computed.

In *Shaffer* v. *Carter*, 252 U. S. 37 (1920), the non-resident taxpayer operated oil wells within the taxing jurisdiction. Obviously, the operation of an oil well is a local activity.

The dictum in *New York* ex rel. *Cohn* v. *Graves*, 300 U. S. 308 (1937), must be read in light of the fact that the only issue before the Court was whether or not the taxation of

rents from real estate located outside New York violated the due process clause.

Wisconsin v. *Minnesota Mining and Mfg. Co.*, 311 U. S. 452 (1940), did not involve an income tax but was concerned with the Wisconsin privilege dividend tax. Also, taxpayer was engaged in many local activities.

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113, 120 (1920), contains a similar dictum. There the taxpayer manufactured nearly all of its products in Connecticut. Connecticut's net income tax was imposed on that proportion of taxpayer's net income which the value of its real estate and tangible property in Connecticut bore to the total value of all its real estate and tangible property. The Court found that plaintiff had failed to demonstrate that the apportionment formula as applied to it was unreasonable and, therefore, upheld the tax. Nothing contained in that opinion can be construed to authorize a tax on a company engaged solely in interstate commerce.

This Court very carefully explained and limited the *Underwood* decision in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203 (1925). The Court said (p. 218):

> "*The local business of a foreign corporation may support an excise measured in any reasonable way*, if neither interstate commerce nor property beyond the state is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 65 L.ed. 165, 41 Sup. Ct. Rep. 45, *approved such an excise measured by income reasonably attributed to intrastate business*; but nothing there said was intended to modify well-established principles."

As a second line of authority petitioner cites the cases which hold that the inclusion of wages or other amounts paid to government employees in their income for tax purposes does not amount to a tax on the government.

Thus, the Court held in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), that amounts paid to construction engineers by governmental subdivisions must be included in computing their taxable income. At that time, *Collector* v. *Day*[1] still stood for the principle that salaries paid to governmental employees could not be included in their taxable income. The *Metcalf & Eddy* case drew a distinction between salaries paid to employees and fees paid to independent contractors. In 1938, *Graves* v. *New York* ex rel. *O'Keefe*[2] overruled *Collector* v. *Day* and held that government employees must pay income taxes on their salaries.

While this is an interesting line of cases, it has no particular bearing on the issues now before the Court. We readily concede that the State of Georgia may impose its income tax on the salary paid to a salesman who resides in Georgia. Although a tax on a salesman's salary no doubt requires his employer to pay a higher salary and thereby indirectly affects commerce, such a tax is not a prohibited burden. Of course, there is nothing in this line of cases to suggest, nor do we understand petitioner to contend, that the federal government may tax the net income of the states or their political subdivisions. In the analogy which petitioner attempts to draw, interstate commerce stands in the same position as the political subdivision. Both have employees. Salaries paid to employees, whether by political subdivisions or by interstate commerce, are includible in the employees' gross income for tax purposes. There is, however, no suggestion that the income of the employer can be taxed. We submit that this line of authority is not pertinent to the issue at hand.

Finally, petitioner points to *Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918), which holds that exporters must pay federal

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[1] 11 Wall. 113 (1871).

[2] 306 U. S. 466 (1939).

income taxes. This case turns on the constitutional provision which provides:

> "No tax or duty shall be laid on articles exported from any State."[1]

While some of the Court's language tends to support petitioner's contentions, there is an obvious distinction between the two cases. With respect to the validity of a tax on exports, the Court said (p. 173):

> ". . . the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance *a tax on the exportation.*"

Petitioner argues that the same rule controls the instant case. He argues that *Peck & Co.* v. *Lowe* stands for the proposition that a tax on net income is not a tax on the source of that income. His brief continues (p. 21): "This proposition cannot be ignored; it refutes absolutely the contention that a tax on net income from interstate commerce *is a tax on interstate commerce.* . . . We think it controls this case."

The foregoing quotation from petitioner's brief points up the reason why the salary cases and the export case are not applicable here. Within the federal system, the states and their subdivisions are exempt from any and all taxation by the federal government. By express constitutional provision, "articles of export" are likewise exempt from taxation. The constitutional provision dealing with interstate commerce does not by its terms, however, prohibit taxation; rather it gives to Congress the power to regulate that commerce. As construed by this Court, the commerce clause prevents the states from placing *burdens on commerce.* The issue is not whether or not a tax is laid on the

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[1]U. S. CONST. art. I, § 9, cl.5.

commerce, but rather whether or not the tax is a burden on commerce. If a corporation engages in intrastate activities within a state, the state may tax the privilege of carrying on the intrastate activity and 'within reasonable limits,' may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.'"[1] Under this rule, income taxes which include proceeds from interstate sales have been found not to burden commerce.[2] But this Court has never approved an income tax on exclusively interstate commerce.

Even if a corporation engages in no intrastate activities, it is not entirely beyond the taxing power of the state. This Court has singled out elusive elements of interstate commerce known as local incidents and has permitted their taxation. Although this concept is highly theoretical, it is founded on practical considerations. Taxable incidents have consistently been limited by this Court to events which are truly localized and which can occur in only one place. The ownership of tangible property[3] and the sale[4] of goods are examples of taxable local incidents. Through this approach, interstate commerce is required to pay its way while chances of multiple taxation and discrimination against interstate commerce are minimized.

Petitioner would now have the Court superimpose a fiction on this ethereal structure. He argues, in effect, that the use of an apportionment formula will localize a portion of the net income of interstate commerce and transform it into a local incident where none existed before. As previously noted, the courts permit great latitude in the appor-

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[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 610 (1951).
[2] *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).
[3] *E.g.*, *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15 (1934).
[4] *General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335 (1944).

tionment formulae which may be used by the states. The concept of a local incident by itself creates some danger of double taxation and discrimination against interstate commerce. The addition of a fiction would compound the danger by geometric proportions.

In determining whether or not a net income tax will burden corporations whose only activities within the state consist of soliciting sales, the Court must bear in mind the practical difficulty which a corporation has in limiting the activities of its salesmen. While a corporation can and ordinarily does limit the number of states in which it has manufacturing plants, warehouses or offices at which the corporation's business is transacted, it can hardly limit the location of its customers. If a corporation is to develop its maximum market, it must go to and contact customers in every taxing jurisdiction. A requirement that a corporation pay general income taxes in every state where its customers are located would amount to a tremendous burden.

Petitioner apparently concedes that the lack of uniformity among the states can, as a practical matter, result in double taxation and that the burden of compliance will at least be an incidental burden. He suggests, however, that interstate commerce look to Congress for protection. As the Court has so frequently held, however, the Commerce Clause of the United States Constitution in and of itself creates an area of free trade among the several states.[1] Historically, corporations have been permitted to tap the national market without being subjected to tariff barriers or other burdens.

It is, of course, true that Congress may by law "redefine

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[1] *E.g., Freeman v. Hewit*, 329 U. S. 249, 252 (1946).

the distribution of power over interstate commerce."[1] Should Congress see fit to permit the states to tax the net income of corporations engaged exclusively in interstate commerce, it can do so. As a condition to such permission, the Congress could be expected to prescribe reasonable safeguards for interstate commerce. No doubt, the Congress would establish a standard allocation formula which would not only avoid the danger of multiple taxation, but would also avoid the excessive costs of compliance and the administration difficulties which would be caused by thirty-five different state taxes. Until such time as Congress acts, however, we submit that the Constitution protects interstate commerce from so substantial a burden.

In conclusion, we should remember that the basic problem of state taxation of interstate selling was first presented to this Court many years ago. In 1887 the rule covering traveling salesmen was established. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489 (1887). The cogent reasoning of the Court's opinion is equally valid today (p. 498):

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be

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[1] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769 (1945). Congress has often returned certain phases of control over commerce to the states. *E.g.*, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (unemployment compensation taxes); and *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946) (insurance).

thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

If a state may impose a net income tax on activities of a foreign corporation engaged exclusively in interstate commerce, then the confusion, the administrative difficulty and the actual monetary burden on small businesses will absolutely prevent their doing a multi-state business. The burden on larger, better established corporations will surely discourage their entry into many states. This is exactly what the commerce clause seeks to prevent and it is confidently urged that the commerce clause does prevent such a result. We respectfully submit that the Georgia income tax, as applied to Stockham Valves & Fittings, Inc., imposes a direct burden on interstate commerce and is, therefore, unconstitutional.

II

DUE PROCESS CLAUSE

I. The fact that respondent maintains one sales service office in Georgia and one of its sales representatives spends one-third of his time in Georgia does not make respondent present in the State in any substantial sense and an attempt to subject it to an income tax violates the Due Process Clause of the Federal Constitution.

At the risk of repetition, it may be helpful once again to point out the very slight connection which respondent had with the State of Georgia. Respondent's only contact with Georgia was through its sales service office in Atlanta, and its sales representative. All of respondent's sales were made on a "f.o.b.-warehouse" basis and were completed outside Georgia by deliveries to customers or to common carriers consigned to customers. All orders were accepted or rejected in Alabama.

It is beyond dispute that a state may not tax activities carried on outside its borders without violating the due process clause of the Federal Constitution. The only question is whether or not respondent's activities created such a connection with the State of Georgia as to permit the imposition of a general income tax on a portion of respondent's net income. The criterion by which to determine whether or not such a connection exists between a business and the taxing state was well stated by this Court in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), where the Court said (p. 444):

> "That test is whether property was taken without due process of law, or, if paraphrase we must, *whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state.* The simple but controlling question is whether the state has given anything for which it can ask return."

In the first section of this brief dealing with the commerce clause considerable emphasis was placed on the *Spector* case[1] and the *Railway Express Agency* case.[2] Both of these recent cases involved taxes on interstate transportation. In neither of these cases was due process an issue since the taxpayers were engaged in substantial local activities.

Miller Brothers Co. v. *Maryland*, 347 U. S. 340 (1954), decided by this Court in the 1953 term, is the most recent due process case involving facts which are similar to those in the instant case. There Maryland sought to collect its use tax from a Delaware merchandising corporation which owned a store in Wilmington, Delaware. Many residents of nearby Maryland came to the store and made purchases, some of which they took away with them, some of which

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[1] *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).
[2] *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954).

were delivered to them in Maryland by common carrier, and others were delivered to them by the store's own trucks. In addition, the store's radio advertising in Wilmington was picked up by Maryland buyers, as was advertising in Wilmington papers, and the store's direct mail advertising was received by them. The similarity between those facts and the facts here under consideration is apparent. Miller Brothers' advertising had a direct effect on Maryland citizens. In both cases the actual sales were effected outside the taxing state. In the instant case, respondent had a sales representative who worked in Georgia. There, Miller Brothers made actual deliveries to Maryland customers in its own trucks. Miller Brothers resisted the payment of a use tax which was passed on to its customers, whereas respondent here resists a more direct burden, in that it must bear the economic effects of the net income tax which Georgia seeks to impose. One cannot say, therefore, that Georgia has any greater justification for imposing an income tax than Maryland had for imposing a use tax.

This Court held that it amounted to a denial of due process of law for Maryland to impose such a tax on Miller Brothers. The Court faced the issue squarely. It said (p. 344):

> "The question here is whether this vendor, [Miller Brothers] by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability."

The Court referred to its previous decisions, saying (p. 344):

> "Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically

overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept: *that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*"

The State of Maryland, as does petitioner, relied on *General Trading Co.* v. *State Tax Comm'n*, 322 U. S. 335 (1944). Speaking for the majority of the Court in *Miller Brothers*, Justice Jackson narrowly limited the application of that case to its own facts. He noted that he had dissented in *General Trading Co.*, but still pointed out that it was clearly distinguishable. He stated that the out-of-state merchant there conducted "*continuous local solicitation* followed by delivery of ordered goods to the customers, the only non-local phase of the total sale being acceptance of the order. Probably, except for credit reasons, acceptance was a mere formality, since one hardly incurs the cost of soliciting orders to reject. The Court could properly approve the State's decision to regard *such a rivalry with its local merchants as equivalent to being a local merchant.*"[1] Such are not the facts here. The majority of respondent's orders from Georgia were received by direct mail or other methods of communication from the customers and bore no direct relation to solicitation by respondent's representative. Respondent had one representative who spent only one-third of his time in Georgia. Orders were rejected for credit and other reasons. (R. 4). The facts here fall under the rule announced in *Miller Brothers* and clearly require a holding that the Georgia income tax is unconstitutional as applied to respondent because it amounts to a denial of due process of law.

The soundness of this conclusion is borne out by reference to *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534 (1951).

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[1] *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 346 (1954).

Although the Court was discussing the commerce clause, its observations are nonetheless pertinent here. It said (p. 537):

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable."

That it is illegal to tax an interstate business merely because it solicits orders or operates a sales office in the taxing state is demonstrated by the converse situation. Manufacturing concerns have often argued that their home state cannot tax their entire net profits, because part of those profits are properly attributable to the states in which their sales activities and customers were located. Uniformly, this Court has rejected this contention. *E.g.*, *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290 (1922); *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918).

In assessing the degree in which respondent's transactions connect it with Georgia, the decision of this Court in *Compania General* v. *Collector*, 279 U. S. 306 (1929), may be helpful, even though the question before the Court was somewhat different. There the taxpayer manufactured goods in the Philippine Islands and sold them in the United States. The Court was asked to construe a statute which laid a net income tax on income "received from sources within the Philippine Islands." The Court found that all orders solicited in the United States were subject to taxpayer's acceptance at its home office in the Philippines. The Court then said (p. 309):

> "If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the mer-

chandise sold was exported before or after its sale; *it could not be seriously contended*, and indeed petitioner does not contend, *that a profit derived from such transactions would not be subject to the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines.*"

In the *Compania General* case, this Court holds that "it could not be seriously contended" that the negotiation and solicitation of orders outside the Philippine Islands followed by shipment of goods to the purchaser would prevent the income from such sales being "received from sources within" the Philippine Islands. Conversely, it cannot be contended that, based solely on its sales activity in Georgia, respondent may be taxed without denying it due process of law.

The Court of Appeals for the Fifth Circuit reached the identical conclusion in a tax case arising under a similar law. *Commissioner* v. *East Coast Oil Co., S. A.*, 85 F.2d 322, *cert. denied*, 299 U. S. 608 (1936). There taxpayer was a Mexican oil company which maintained sales agencies in the United States. Its salesmen negotiated contracts for the sale of oil and actually collected the purchase price thereof. Title to the oil, however, passed to the buyer in Mexico. The question was whether or not any income had been "derived from sources within the United States." The court stated (p. 323):

> "In this case the important question is when and where were the profits earned. The company is a Mexican corporation, necessarily domiciled in that country. The property sold was produced in Mexico. The contracts provided for firm sales. No profit resulted from the mere execution of the contracts. The oil was delivered to the buyer in Mexico. The title passed to the buyer in Mexico. When title passed the profit was

earned in Mexico. Collection of the price in the United States was incidental and did not earn the profit.

"We agree with the conclusion of the board that the taxes were unlawfully assessed on income derived from sources without the United States."

If it cannot be said that any income is derived from selling activities, it is difficult to see how such activities will permit the imposition of a net income tax without denying due process of law.

2. Activities within a state, sufficient to satisfy due process for one purpose, may not satisfy due process for a different purpose.

We agree with petitioner that a corporation being an artificial creature, its presence within a state can only be manifested "by activities carried on in its behalf by those who are authorized to act for it."[1] Under the due process clause, those activities must be of a certain quality and a certain quantity before the corporation is subject to the jurisdiction of a state. Petitioner argues that the quality and the quantity of activities necessary to satisfy the due process clause are the same for all purposes. He indiscriminately discusses cases dealing with the activities of a corporation required to justify service of process, unemployment compensation taxes, sales taxes, use taxes and income taxes.

Thus, petitioner emphasizes *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1914). There, salesmen representing International Harvester solicited business in Kentucky. That case is different from the instant case because the International Harvester salesmen had authority to and did in fact receive payment for the goods which they sold. The real fallacy in petitioner's argument, however, is that

[1] *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945).

the only issue in the *International Harvester* case was whether or not process could be served on the company in Kentucky.

This Court's decision at the last term in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957), illustrates the distinctions which must be drawn between various due process cases. International Insurance Company was incorporated in Texas. In 1948 it entered into an agreement with Empire Mutual Insurance Company to assume all of that company's outstanding policies. At that time it mailed a re-insurance certificate to the plaintiff who was a California resident. Thereafter, the plaintiff mailed his premiums to the defendant's home office in Texas. The beneficiary, a California resident, brought suit for payment of the policy in California. The defendant had no other connection with the state. In reaching a decision that the insurance company was subject to suit in California, the Court said (p. 201):

> "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. (Citations omitted). The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died."

Although International Life Insurance Company carried on sufficient activities within the State of California to subject it to suit on a policy insuring the life of a California citizen, no one would seriously contend that those slight activities would subject it to California's general net income tax. Surely, it would be a denial of due process to require an insurance company to file annual income tax returns and pay a state income tax solely because it wrote a policy of insurance on the life of one of the state's citizens.

A case in which the facts were quite similar to the *McGee* case fortifies the conclusion that activities may satisfy due

process for one purpose but not for another. In *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (1938), California imposed a tax on all life insurance premiums collected by foreign insurance companies from California citizens and, in addition, on premiums received under re-insurance agreements with other insurance companies covering California lives. Connecticut General urged that these re-insurance agreements were entered into outside of California, that premiums and losses were paid outside of California, and that the mere fact that the policies re-insured lives of California citizens did not give the state jurisdiction to impose a tax on the collection of such premiums. This Court held that even though the policies of re-insurance were on California lives, taxation of the re-insurance premiums would amount to a denial of due process of law.

Under the principle announced in the *McGee* case, a California citizen could presumably bring suit in California on a re-insurance agreement covering his life without violating the due process clause. For the purpose of taxation, however, the same activities are insufficient. That activities which satisfied due process for one purpose may not satisfy due process for another purpose is evident. The *McGee* case, which was very similar on its facts to the *Connecticut General* case, reached an opposite conclusion without even citing the *Connecticut General* case. Evidently the Court did not consider a case dealing with taxation to be pertinent to an inquiry into the constitutional validity of the service of process.

Not only do activities which satisfy due process for purposes of taxation differ from the activities required for service of process, but the activities necessary to uphold one type of tax may differ from those required to uphold another type. In *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), the Court upheld the Washington unemployment compensation tax on salaries paid to tax-

payer's salesmen. These salesmen were residents of Washington, apparently spent their entire time within the state and, in some instances, maintained permanent showrooms in the state. The unemployment compensation tax was based on the salaries paid to the salesmen. Had the salesmen become unemployed, they would have been a charge on the State of Washington. The tax was on the precise activities which the corporation carried on within the state.[1] It should also be noted that taxpayer's activities within the state were considerably more numerous than those of respondent.

Another type of tax which may be imposed on foreign corporations even though they have minimum contacts with the taxing state is the sales tax.[2] Again, the tax is laid directly on a transaction which occurs within the state—the sale of merchandise.

The degree of activity by a foreign corporation necessary to satisfy due process must, therefore, be determined in light of the obligation that the state is attempting to impose on the corporation. Very little activity is required if the question is whether or not suit may be brought on a contract which bears direct relation to the state. Not a great deal of activity is required if the state attempts to tax a transaction which occurs within its borders. Taxes on salesmen's salaries and taxes on sales illustrate the latter point. If a state, however, endeavors to treat a foreign corporation in the same manner as a domestic corporation and to impose a general net income tax or other general obligation on the corporation, traditional notions of fair play require more substantial connections. Activities by a sales repre-

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[1]The Commerce Clause was not involved in the *International Shoe* case as Congress had passed a statute permitting the imposition of such a tax on commerce.

[2]*E.g., General Trading Co.* v. *State Tax Comm'n.*, 322 U. S. 335 (1944).

ntative who has no authority to act for the corporation, cept in soliciting orders, is not a substantial connection. aditionally, the activities of a sales organization have en held not even to constitute doing business. See, *E.g.*, *edwine* v. *Don River Mills, Inc.*, 207 Ga. 381, 61 S. E. 2d 1 (1950). Those activities do not justify the imposition a general income tax measured by a portion of the com-ny's over-all profit which is related only indirectly, if all, to the activities carried on within the state.

By denying the states the right to collect net income taxes om interstate concerns whose activities within the juris-ction are limited to sales solicitation, interstate commerce es not obtain a free ride. Property taxes, sales taxes, employment compensation taxes and other taxes on local tivities of a foreign corporation may be collected by the ates. Through its sales and use tax, a state is fully com-nsated for providing a market in which a foreign corpo-tion may sell its goods.[1] By taxing the corporation's ngible property, a state is compensated for the protection forded that property. Through its gasoline taxes, a state compensated for use of its highways. Through its taxes employees' incomes, a state is compensated for the serv-es which it provides for such persons. Through unem-oyment compensation taxes, a state defrays a portion of e cost of its welfare program. It is evident, therefore, at a limitation on a state's power to impose its general t income tax does not give foreign corporations a free le, nor does it seriously affect the revenue sources of e states.

Respondent has no such connection with the State of orgia as will permit the imposition of a net income tax thout denying it due process of law.

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[1] In addition to an income tax, Georgia also imposes a sales and e tax.

CONCLUSION

It is respectfully submitted that, as applied to respondent, the Georgia income tax violates both the commerce clause and the due process clause of the United States Constitution, and that the decision of the Supreme Court of Georgia should therefore be affirmed.

Respectfully submitted,

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APPENDIX

P-H CHART OF ALLOCATION AND APPORTIONMENT FACTORS*

State (A)	Factors Used In Apportionment Fractions: Property (B)	Receipts (C)	Payroll (D)	Others (E)	Items separately Allocated (F)	Separate accounting allowed? (G)
ALA.[1]	Yes	Yes	No	14		Yes
ALASKA	Yes	No	Yes		1-5	Yes
ARIZ.	Yes	Yes	Yes		1-5	Yes
ARK.	No	Yes	No	1,14	1-6	Yes
CALIF.	Yes	Yes	Yes	2	2-5,7	Yes
COLO.	Yes	Yes	No		1-5	Yes
CONN.	Yes	Yes	Yes	21	1,3-5,7,20	Yes
DEL.	Yes	Yes	Yes		2,3,5;15,16,20	Yes
D.C.	No	Yes	No		2-5,7,9,14,20	Yes
GA.	Yes	Yes	Yes	4-6	2-5,7	Yes
HAW.	Yes	Yes	Yes			Yes
IDA.	Yes	Yes	Yes		2,3,5,6,16	Yes
IOWA	No	Yes	No	3	2-5,8	Yes
IND.[2]	No	No	No			
KAN.	Yes	Yes	No	4,5,14	1-5	Yes
KY.	Yes	Yes	Yes	5	13	Yes
LA.	Yes	Yes	Yes	16	1-6	Yes
MD.	Yes	Yes	Yes		2,3	Yes
MASS.	Yes	Yes	Yes		1,4,5	No
MINN.	Yes	Yes	Yes	20	1-5	Yes
MISS.	Yes	Yes	Yes[1]	4,5	2-5,10-12	Yes
MO.	No	Yes	No		1-5	Yes
MONT.	Yes	Yes	Yes	7,19	1-5	Yes
N. MEX.	Yes	Yes	No	13	2,4,13	Yes
N. Y.	Yes	Yes	Yes	8	1-5,9	Yes
N. C.	Yes	Yes	Yes	4-6,9	1-5,7,16,17	Yes
N. D.	Yes	Yes	Yes	10	1-5,7	Yes
OKLA.	Yes	Yes	No	5,15	1-5	No
ORE.	Yes	Yes	Yes	18	1-5,17	Yes
[illegible]	[illegible]	[illegible]	[illegible]	11	1-5	[illegible]

DEL.	Yes	Yes	Yes			Yes
D.C.	No	Yes	No		2-5,7,9,14,20	Yes
GA.	Yes	Yes	Yes	4-6	2-5,7	Yes
HAW.	Yes	Yes	Yes			Yes
IDA.	Yes	Yes	Yes		2,3,5,6,16	Yes
IOWA	No	Yes	No	3	2-5,8	Yes
IND.[2]	No	No	No			
KAN.	Yes	Yes	No	4,5,14	1-5	Yes
KY.	Yes	Yes	Yes	5	13	Yes
LA.	Yes	Yes	Yes	16	1-6	Yes
MD.	Yes	Yes	Yes		2,3	Yes
MASS.	Yes	Yes	Yes		1,4,5	No
MINN.	Yes	Yes	Yes	20	1-5	Yes
MISS.	Yes	Yes	Yes[1]	4,5	2-5,10-12	Yes
MO.	No	Yes	No		1-5	Yes
MONT.	Yes	Yes	Yes	7,19	1-5	Yes
N. MEX.	Yes	Yes	No	13	2,4,13	Yes
N. Y.	Yes	Yes	Yes	8	1-5,9	Yes
N. C.	Yes	Yes	Yes	4-6,9	1-5,7,16,17	Yes
N. D.	Yes	Yes	Yes	10	1-5,7	Yes
OKLA.	Yes	Yes	No	5,15	1-5	No
ORE.	Yes	Yes	Yes	18	1-5,17	Yes
PA.	Yes	Yes	Yes	11	1-5	No
R. I.	Yes	Yes	Yes			No
S. C.[1]	Yes	Yes	No	12,14	16	Yes
TENN.	Yes	Yes	No	17	19	Yes
UTAH	Yes	Yes	Yes		2-5,15	Yes
VT.	Yes	Yes	Yes			No
VA.	Yes	Yes	No			Yes
WIS.	Yes	Yes	No	14	1-6,14	Yes

[Footnotes to chart.] (Dashes signify inclusive numbers.)

Col. A.—(1) Domestic corporation can't allocate. (2) Gross income tax, no allocation.

Col. D.—(1) Manufacturing labor only, direct and indirect.

Col. E.—(1) For manufacturing sales corporations, marketing cost if no production in state. (2) Mileage for refrigerator cars. (3) For business other than manufacture or sale of tangible personalty, tax commission may make rules, including rules covering property, receipts and payroll. (4) Special provision for railroads. (5) Special provision for public utility companies. (6) Special provision for other specialized businesses.

(7) Such other factors as taxpayer deems applicable. (8) 3-factor formula for business income and capital; investment income and capital separately treated. (9) For manufacturing, assembling, etc., corporations. (10) Cost of goods consumed or sold. (11) Separate provision for construction, insurance and surety companies. (12) For manufacturing business. (13) Operating expenses. (14) Manufacturing cost. (15) Cost of operation. (16) Special provisions for air transportation companies, pipe lines, other transportation companies, service enterprises and loan businesses. (17) Special provisions for carriers, sellers, insurance companies, manufacturers, construction companies, and businesses not enumerated. (18) Special provision for air, water and motor carriers, railroads and financial businesses. (19) Special provision for interstate carriers. (20) Special provision for insurance and investment companies. (21) Special provision for commercial aviation, telephone and bus companies.

Col. F.—(1) Capital gains. (2) Rents. (3) Royalties (except from patents in Utah). (4) Dividends. (5) Interest. (6) Income from services or labor performed in state. (7) Gain on sale of assets not connected with the business. (8) Income from personal services. (9) Income from sale of realty. (10) Income from property produced and sold in different places. (11) Insurance premiums. (12) Income from ownership or operation of property. (13) Sales, bonuses or other income directly allocable to state. (14) Income from construction repairs and similar services. (15) Tangible capital assets. (16) Gain or loss on sale of realty. (17) Gain from sale of tangible assets not connected with business. (18) Non-business income. (19) Income from constructing or improving real property. (20) Gain or loss from sale of intangibles.

*P-H, State & Local Taxes, All States Report Bulletin No. 34, par. 34.1, March 4, 1958.

P-H CHART OF FACTORS CONTROLLING RECEIPTS ALLOCATION*

State	Location of: Office where negotiated (A)	Property at time of order (B)	Receipt or acceptance of order (C)	Negotiating personnel (D)	Delivery place (E)	Shipment origin (F)	Other (G)
Ala.	X[1, 2]	X[1]					
Alaska							X[1]
Ariz.				X[1]			
Ark.							X[2]
Calif.				X[1]			
Colo.					X		
Conn.			X[1]				
D.C.	X[6, 7]			X[2]			
Del.					X		
Ga.					X[6]		
Hawaii	X[5]		X[2]		X[3]		
Idaho			X[3]				
Ind.							X[3]
Iowa			X		X[6]		
Kans.	X[2, 6]						
Ky.	X[7]						
La.					X		
Md.	X[2, 9]						
Mass.	X[7, 10]						
Minn.	X[10]						X[4]
Miss.	X[11]				X[7]	X[3]	
Mo.	X		X[6]		X	X	X[5]
Mont.	X[12]	X[2]	X[6]		X[6]	X[2]	
N. M.							X[2]
N. Y.		X[2]	X[4]				
N. C.					X[1]		
N. D.	X[7]				X	X	
Okla.	X[13]		X[5]		X[4]		
Ore.		X[4]		X[1]	X[3]		
Pa.	X[8, 10]			X[3]			
R. I.	X						
S. C.	X[4]		X[7]				
Tenn.	X[2, 6]			X[4]	X[5]		
Utah	X[10]	X[3]	X[6]	X[5]	X[6]	X[2]	
Vt.		X[2]	X[4]				

Ky.	X[7]						
La.					X		
Md.	X[3, 9]						
Mass.	X[7, 10]						
Minn.	X[10]						X[4]
Miss.	X[11]				X[7]	X[3]	
Mo.	X		X[6]		X	X	X[5]
Mont.	X[12]	X[3]	X[6]		X[6]	X[2]	
N. M.							X[3]
N. Y.		X[3]	X[4]				
N. C.					X[1]		
N. D.	X[7]				X	X	
Okla.	X[13]		X[5]		X[4]		
Ore.		X[4]		X[1]	X[3]		
Pa.	X[8, 10]			X[3]			
R. I.	X						
S. C.	X[4]		X[7]				
Tenn.	X[2, 6]			X[4]	X[5]		
Utah	X[10]	X[3]	X[6]	X[5]	X[6]	X[2]	
Vt.		X[2]	X[4]				
Va.	X					X	X[6]
Wisc.	X[2]		X				

Col. A.—(1) Conflict; form instructions use Col. A, regulations Col. B. (2) Sales through or by offices, agencies or branches in the state. (3) Sales to District customers fairly attributable to District activity, including solicitation. (4) Numerator sales include those principally secured, negotiated or effected by employees, agents, consignees, offices or branches resident or located in the state. (5) See Col. C. (6) Public or private warehouse treated like office, (7) Office, agency or place of business, where transaction chiefly negotiated. (8) Privilege income tax only. (9) Also sales solicited, outstate if not through established agents, offices or branches maintained outstate. (10) All sales not negotiated or effected by agents or agencies chiefly at, connected with or sent out from business premises outstate. (11) Sales assignable to office, agency or place of business where binding sale or agreement first occurs. (12) Statute authorizes administrative rules; Mass. formula generally acceptable. (13) Includes sales between outstate points if order secured or received by Okla. office or salesman working from it.

Col. B.—(1) Location of property at time of receipt of or appropriation to order. (2) Numerator includes receipts from property in state on receipt or appropriation to order, or not located at permanent outstate business place of taxpayer when order received or accepted in state. (3) One element of local sale. (4) If no sales activity needed.

Col. C.—(1) Place finally passing upon the consummation. (2) Includes sales accepted by office or representative in Hawaii and delivered to outside purchaser if taxpayer not doing business at delivery point. (3) Office, warehouse, etc., where orders received and accepted. (4) See Col. B. (5) See Col. A, ft. (13). (6) One element of local sale. (7) By 1958 amendment for new industries; others after 1-1-60.

Col. D.—(1) Place where selling services are performed. (2) See Col. A, ft. (3). (3) For direct (property) income tax only. (4) See Col. A, ft. (4). (5) Outstate sales included if effected by local salesman.

Col. E.—(1) Deliveries in the state, excluding deliveries for out-shipment. (2) Ga. Ct. of Appls. held sole test to be "destination of goods" (92 S.E. (2d 548; revd. on other grounds, Ga. Sup. Ct. 95 S.E. 2d 848). (3) Includes deliveries to local purchasers. (4) See also Col. A, ft. (13). (5) Sales to customers in Tenn. (6) One element of local sale. (7) Controlling factor when shipment originated in same state.

Col. F.—(1) See Col. B, ft. (5). (2) One element of local sale. (3) Controlling factor when delivery is in same state.

Col. G.—(1) Receipts not used in allocation. (2) No detail as to sales receipts used. (3) No allocation provision. (4) See Col. A, ft. (7). (5) All sales or business transacted in state and half that transacted partly in and partly outside. (6) Residence or location of payor and place of manufacture.

***P-H, State & Local Taxes, All States Tax Guide, par. 1047.**

P-H CHART OF WAGE ALLOCATION FACTORS*

State (Col. 1)	Office Location: Chief Hdq. (Col. 2)	Local Branch (Col. 3)	Premises Owned (Col. 4)	Premises Rented (Col. 5)	Premises Maintained or Used (Col. 6)	Time Spent (Col. 7)	Mileage and Other (Col. 8)
Alaska						√ (1)	√ (1)
Ariz.						√	√ (2)
Calif.						√	
Conn.	√				√ (1)		
Del.						√	√ (7)
Ga.							√ (4)
Hawaii							√ (1)
Kan.	√						
Ky.	√						
La.						√ (2)	√ (2)
Md.						√	
Mass.			√	√	√		
Minn.			√				
Mont.			√			√	√ (6)
N. Y.	√ (1)				√ (1)	√ (3)	
N. C.	√				√ (1)		√ (5)
N. D.							√ (1)
Okla.	√					√ (4)	√ (1, 2)
Ore.						√ (2)	√ (1, 2)
Pa.		√ (1)			√ (2)		√ (1-3)
R. I.	√				√ (1)		
Utah			√	√			
Vt.	√ (1)				√ (1)	√ (3)	√ (6)

Col. 2. (1) N. Y., Vt.—If inequitable, volume of business or value of services or working time permitted. Col. 3. (1) Pa.—For indirect tax. Col. 6. (1) Place of business instate (Conn., N. Y., N, C., R. I., Vt.). (2) Pa.—For direct tax. Col. 7. (1) Alaska.—For certain transportation employees. (2) Alternate for salesmen on commission is sales. (3) N. Y., Vt.—Only if office location inequitable. (4) Okla.—For itinerant employees. Col. 8. (1) Based on instate work or services. (2) Based on mileage for certain transportation employees only. (3) For direct tax. (4) Based on residence of employee. (5) Only to extent paid or incurred instate. (6) Based on value of services if employee paid for results achieved; on volume of business if paid on that basis. (7) Del.—Compensation paid to employees within the state.

*P-H, State & Local Taxes, All States Tax Guide, par. 1048.

P-H CHART OF PAYROLL ALLOCATION ELEMENTS

State	Class of Employee Included (1)			Type of Compensation Included (1)			
	Officers	Directors	Independent Agents	Commissions	Bonuses	Board & Lodging	Other
Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7	Col. 8*
Alaska	(1)	(1)		√	√	(1)	√
Arizona	√			√	√	(1)	√
California	√			√	√	√ (2)	√
Connecticut	√						√
Delaware	(2)						√
Georgia	√		√ (1)	√		(1)	√
Hawaii	√			√	√	(1)	√
Kentucky	(2)			√	(2)	(1)	√
Louisiana	√			√			√
Maryland							√
Massachusetts				√	√		√
Minnesota	√			√	(3)	(1)	√
Montana	(3)	(2)		√ (1)	(2)	(1)	√
New York	(2)	(3)		√		(1)	√
North Carolina	(2)	(3)		√			√
North Dakota						(1)	√
Oklahoma	√						√
Oregon				√	(1)	(1)	√
Pennsylvania	√			√			√
Rhode Island	√						√
Utah	√			√			√
Vermont	(2)	(3)		√	(2)	(1)	√

[Footnotes] **General.** (1) See Column 8 and related comment. **Col. 2.** (1) Compensation paid to officers is specifically subject to withholding under state law and, by analogy, might be held to be within scope of allocable compensation. (2) Pay to executive officers is specifically excluded. (3) Compensation of executive and administrative personnel subject to withholding and probably includible in allocable income. **Col. 3.** (1) Specifically excluded from state withholding and, by analogy, probably not allocable compensation. (2) Mont.—"Administrative and executive personnel" are subject to withholding and payment may be allocable compensation. (3) Specifically excluded. **Col. 4.** (1) Paid to "agents". **Col. 5.** (1) **Mont.**—Compensation based on volume of business is allocating factor. **Col. 6.** (1) State withholding specifically covers bonuses. (2) Follows federal inclusion in gross income. (3) State income tax specifically includes bonuses as taxable compensation. **Col. 7.** (1) State income tax may treat board and lodging (subsistence) as taxable income in some cases. (2) Calif.—For allocation by seagoing personnel. Footnote (1) also applies. **Col. 8.** (1) Catch-all classification, such as "other compensation", might be extended to embrace some of the preceding types of compensation.

***P-H, State & Local Taxes, All States Tax Guide,** par. 1048.

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No. 33

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

T. V. WILLIAMS, as State Revenue Commissioner,
Petitioner,

v.

STOCKHAM VALVES & FITTINGS, INC.,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

Needless to say, the questions presented by the instant case are of great importance to all manufacturing companies which do an interstate business and to all of the states. Not only counsel for the respondent, but represen-

tatives of many companies and trade associations, hav carefully examined the professional literature, both in th field of law and in the field of economics, to determine wha research has been done on the effect that state income taxe would have on interstate commerce under the circumstance of this case. Apparently no study of this problem has eve been published.

A number of these companies and trade associations, dis turbed by the increasing number of states which are threat ening to impose similar income taxes on foreign corpora tions, believed that a practical investigation of the proble would point the way to its solution by the judicial and legis lative branches of the federal and state governments. Ac cordingly, they made available a grant to be used by a outstanding economist, Dr. Paul Studenski, in undertakin such an investigation. An article describing his work wa just completed last week and is scheduled to appear in th November issue of The Harvard Business Review. By per mission of the Review and the authors, we are printing th article in the Appendix to this brief.

The study described in this article was conducted durin the winter and spring of 1958. In the course of the study interviews were held in various states with many compan executives, tax officials, tax accounting firms and scholar A comprehensive questionnaire was used, extensive cor respondence was carried on, and a thorough search wa made through the existing literature.

The article, entitled "A New Threat in State Busines Taxation," outlines the development of state income ta laws and describes the practices which have been followe in the past. It then points to the recent attempts by certai states to extend the application of their corporate incom taxes to companies which merely solicit orders in the stat Finally, based on data which the authors have collected,

analyzes the rationale and potential economic effects of these innovations.

Dr. Paul Studenski is Professor Emeritus of Economics at New York University and Senior Fiscal Consultant to the New York State Special Legislative Committee on the Revision and Simplification of the Constitution (otherwise known as the Rockefeller Committee). He has been on the faculty of New York University since 1927, having been a professor since 1935. In 1955-57, he was Director of the Albany Graduate Program in Public Administration. Over the past forty or more years he has served as fiscal consultant or research director to numerous federal, state and municipal agencies, including the New York State Division of the Budget, the New York State Commission on the Revision of the Tax Laws, the Bureau of the Budget, the New York City Mayor's Committee on Finance, the U. S. Social Security Board, the Board of Economic Welfare, the Temporary National Economic Committee of the United States Congress, and many others. He is the author of several books, including "Taxation and Public Policy," "Government of Metropolitan Areas," "Chapters in Public Finance," "Variations in State Fiscal Capacities," "Financial History of the United States" (with H. E. Kroos), and "The Income of Nations" (scheduled to appear this month). He is the author of numerous articles on public finance in professional and scientific journals.

Dr. Studenski's co-author, Dr. Gerald J. Glasser, is Assistant Professor of Economics at New York University. He is the author of several articles in the field of economics and statistics and has served as consultant to several governmental agencies.

"A New Threat in State Business Taxation," by Dr. Paul Studenski and Dr. Gerald J. Glasser, is a penetrating study of the impact of taxes such as Georgia asks this Court to uphold. The authors' conclusion that such taxes

will amount to a tremendous burden on commerce is inescapable.

Respectfully submitted,

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October 13, 1958

APPENDIX

Any company that makes sales in more than one state faces a . . .

NEW THREAT IN STATE BUSINESS TAXATION

From the Havard Business Review, November 1958

By Paul Studenski and Gerald J. Glasser

State taxes on corporate net income have always posed difficult legal, economic, administrative, and accounting problems, both for the authorities imposing them and for the corporations paying them. These difficulties threaten to become even greater if certain alterations in the concepts of these taxes recently introduced in some states are fully enforced, adopted by other states, and allowed by the courts to prevail. We refer to the application of such taxes to out-of-state corporations which maintain no factories, warehouses, stores, or other permanent establishments in the tax-levying state, but merely solicit orders and ship goods to customers in it.

EMERGENCE OF PROBLEM

The difficulties that have attended the application and administration of corporate income taxes stem largely from the fact that most corporations of any size operate properties, maintain regular business establishments, and solicit orders in more than one state. It is not always clear what portion of their income, if any, derives from their operations within a particular state. Not only is a corporation likely to be taxed on its net income by several states, but it

AUTHOR'S NOTE: This article presents the results of a study prepared under a grant made available by a group of industries and trade associations to the senior author, who, in turn, arranged for Dr. Glasser to assist him in the work. Acknowledgment is due to the many company executives, state tax officials, accountants, and scholars who contributed factual information.

may be taxed by a state which really has no right to tax i
Moreover, it may be unfairly subjected to a double or trip
burden on the same portion of its net income.

Under the due process clause of the federal constitutio
a state is permitted to tax only those persons, propertie
and transactions that have some connection with it. B
what constitutes a sufficient connection in the case of co
porations doing interstate business is the crucial questio
In addition, there is always the possibility of a state a
plying the tax to a corporation in such a way as to interfe
with interstate commerce in violation of the federal const
tution. Thus, it is easy to see how the application of corp
rate net income taxes can give rise to litigation that mig
begin in the state courts but would be settled definitive
only when it reached the Supreme Court.

In its jurisdictional and allocational aspects, the sta
corporate income tax is more complicated than almost ar
other state business tax. Were it not for the fact that und
many circumstances it is more equitable and also econor
ically sounder than any of the other state business taxe
it would never have been as widely accepted by state go
ernments and taxpayers as it has been.

Traditional Concept

Until recently the state corporate income tax has bee
applied only to corporations maintaining some permanen
establishment in the state, such as a manufacturing plan
a warehouse, a wholesale or retail outlet, or an office th
accepts orders for execution. The tax has been applied,
other words, to corporations employing capital and labo
in the state in a regular way, thus constituting a more
less permanent and integral part of the state's economy

The state in which the corporations carry on their pr
ductive activities is vitally concerned with their growth ar

prosperity because these companies are essential factors in the over-all growth and prosperity of the state's economy. For this reason, the state renders them a variety of protective and economic services which facilitate their operations and help them to earn a profit. It has, therefore, a rightful claim for a share of the net income of these corporations.

Until the end of World War II no state applied its corporate income tax to out-of-state corporations that merely solicited orders in the state or shipped goods to customers there in fulfillment of orders relayed to the home office. Such corporations were not considered to be a part of the state's economy or the recipients of any benefits that would entitle the state to tax them. Admittedly, the state maintains a market in which the out-of-state corporations sell their goods, but it does so primarily for the benefit of its citizens and not for that of these corporations. It is not interested in seeing that out-of-state corporations earn a net income from their sales; this concern, it is felt, properly belongs to the home states of these corporations.

Until recently, too, the states using the corporate income tax applied it under allocation formulas emphasizing location of property, maintenance of payrolls, and site of the administrative offices in which orders were received for execution. These formulas were comparatively fair and did not differ in principle too much from state to state. By adhering to these simple rules the states managed to keep unfair multiple taxation of corporate net income to a minimum and to administer taxes with a reasonable degree of efficiency and without excessive harassment of their corporate taxpayers.

New Formulas

Since the end of World War II, however, several states have altered their statutes or have reinterpreted them to

extend the application of their corporate income taxes to out-of-state corporations that neither own and operate properties there nor maintain any permanent establishments authoritatively representing the company. This has been part of a trend toward the extension of state taxation into the field of interstate commerce.[1] At the same time, quite a few states have altered their existing allocation formulas by substituting sales-by-destination or sales-by-site-of-solicitation criteria for the more conventional receipts factor or else by modifying some of the other factors. The result is that allocation formulas have become much more diversified, and the possibilities for unfair double or multiple taxation of corporations have been greatly increased.

This extension of the jurisdictional base of the states' corporation income taxes, combined with the alterations in their allocation formulas, threatens to make corporations throughout the country subject to taxation on their net income by many more states. It promises to make these taxes increasingly burdensome and more difficult to administer and comply with. Worst of all, it may cause them to become serious impediments to interstate commerce.

Cases Pending

Some of the corporations suddenly presented with an income tax assessment in states where they have merely been selling goods have protested and have applied to the courts for a review of the constitutionality of the assessments. Three such cases involving the same issue, although in a somewhat different context, after having been variously ruled on by the courts of their own states, have reached the

[1] See the following articles by Edward Roesken in *Taxes:* "State Taxation of Foreign Corporations," September 1950, p. 819; "The Impact of the Spector Decision," July 1951, p. 523; "Recent State Tax Trends," January 1952, p. 9; and "State Tax Trends," February 1955, p. 131.

Supreme Court. At the moment of this writing two are scheduled to be heard shortly and the third has been petitioned for a review. Similar cases originating in still other states are now pending in the state courts and may have to go to the Supreme Court for final adjudication.

The three cases being brought before the Supreme Court are *Williams* v. *Stockham Valves & Fittings, Inc.*, involving Georgia's corporate net income tax; *State of Minnesota* v. *Northwestern States Portland Cement Co.*, involving Minnesota's tax; and *Brown-Forman Distillers Corporation* v. *Collector of Revenue*, involving Louisiana's tax. The circumstances involved in these cases are as follows:

Stockham Valves & Fittings, Inc., a corporation organized under the laws of Delaware, has both its administrative office and its manufacturing plant in Birmingham, Alabama. It maintains warehouses in 5 states (Alabama, Pennsylvania, Illinois, Texas, and California), sales offices in 7 states (Massachusetts, New York, Georgia, Pennsylvania, California, Texas, and Missouri) and in the District of Columbia, and it ships its products (valves and pipe fittings) to customers in all 49 jurisdictions. It has paid income taxes to Alabama, California, Pennsylvania, and the District of Columbia, but has protested paying an income tax recently imposed on it in Georgia (with arrears and penalties running back to 1952).

Stockham's objection is based on the fact that its sales representative spends only one-third of his time in Georgia, and is employed only in soliciting orders and in promotional work; all orders from Georgia customers are accepted or rejected at the home office in Alabama, and all goods are supplied from the office or factory in Alabama. The company maintains that the imposition of the tax runs afoul of the commerce clause and the due process clause. The Supreme Court of Georgia upheld the company, but the state attorney

general appealed the decision to the Supreme Court of the United States.

Northwestern States Portland Cement Co. has a manufacturing plant in Iowa. It maintains a sales office in Minnesota and sells its products (cement and cement products) in the North Central states. In its Minneapolis office it employs five salesmen and a secretary. The salesmen write orders and do promotional work, but all orders are subject to acceptance at the home office in Iowa and are filled from inventories in Iowa. Minnesota has recently assessed its income tax on the company with arrears and penalties going back to 1933.

The company appealed to the courts on the ground that the tax violated the commerce clause. The Supreme Court of Minnesota, however, ruled against it. Therefore, the company appealed to the Supreme Court of the United States.

Brown-Forman Distillers Corporation is a Kentucky company engaged in the manufacturing and packaging of alcoholic beverages in that state. It receives orders from wholesalers at its home office, where they are accepted or rejected and where, on acceptance, the orders are filled by direct shipments to the wholesaler. The extent of its Louisiana activity is to ship goods into the state and to maintain "missionary men" whose sole activity is occasionally to accompany salesmen of the wholesaler and to seek to persuade retailers to display the company's products prominently.

In 1954 Louisiana demanded payments by the company of the state corporate income tax covering the years 1951 through 1953, and, subsequently, through 1955. The company paid under protest, appealing to the courts on the ground that it did not maintain any stock of goods in Louisiana nor any salesmen in the state, and that the assessment of the tax on it was in

violation of the commerce and due process clauses. The Supreme Court of Louisiana in February 1958 ruled against the company. The company then, in June, submitted a petition to the Supreme Court of the United States for a review.

The decisions of the Supreme Court in these three cases are being anxiously awaited by state tax administrators as well as by many corporations and business organizations throughout the country. Whichever way they go, if definitive, they will have momentous consequences.

Legal Distinctions

In a discussion of this type we can disregard some of the legal distinctions often observed by tax specialists:

> Throughout this article we refer to the corporate income tax as any general tax on corporations that uses net income as a basis for its computation. In legal terminology a distinction is made between the so-called "franchise tax measured by net income" and the "corporate net income tax," not designated as a franchise tax but sometimes referred to as a "direct tax on corporate net income." This distinction is presumed to have important jurisdictional implications. The franchise tax, because it is imposed on the privilege of doing business in the state, is supposed to be more limited by the commerce clause than the direct corporation income tax.[2]

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[2]See George T. Altman and Frank M. Keesling, *Allocation of Income in State Taxation* (New York, Chicago, Commerce Clearing House, 1950), p. 29; Jerome R. Hellerstein, "Recent Developments in Commerce Clause Limitations on State Taxation," *The Tax Executive*, January 1958, pp. 120-121; Fred L. Cox, "Interstate Commerce and a State's Right to Revenue," *Taxes*, January 1952, p. 25; Reuben Clark, Jr., "Interstate Commerce and a State's Right to Revenue: A Rejoinder," *Taxes*, April 1952, p. 263; and Edward Roesken, "The Impact of the Spector Decision," *loc. cit.*

For this reason, some states, including California, Pennsylvania, Minnesota, and Oregon, have in recent years supplemented their corporation franchise tax measured by net income with a direct corporate net income tax. While continuing to apply the first to corporations operating property within the state and carrying on substantive business operations in both intrastate and interstate commerce, they apply the second tax to out-of-state corporations that merely solicit orders and sell goods in the state—in other words, to the group engaged solely in interstate commerce. They specifically identify the latter tax in their statutes as applicable to corporations engaged solely in interstate commerce. The assumption seems to be that through the use of this tax states can bypass the strictures of the commerce clause. The direct corporate net income tax in these states is thus primarily a legal device for taxing the net income of out-of-state corporations.

From an economic point of view, however, there is no difference between the franchise and the non-franchise corporate income taxes. Both of them find their economic justification in the fact that corporations receive certain services from the state which enable them to earn a net income from business done within the state. Therefore, since we are not concerned here with an analysis of legal technicalities in the imposition of corporate income taxes, we shall disregard these differentiations in legal nomenclature and speak of both taxes as "corporate income taxes."

There is another legal distinction in the application of corporate income taxes which is of no great economic importance—namely the distinction between the so-called "domestic" and "foreign" corporations, the first designating those chartered in the state and the second those chartered in other states or in foreign countries. Generally, the corporation income tax is ap-

plied to both types of corporations with no differentiation in base and rate structure.

From an economic point of view, it is unimportant whether a corporation has received its charter in one state or another. The only significant difference is between corporations which own and operate properties in the state and have a definite and permanent business site in it and those which merely solicit orders.

HISTORY & DEVELOPMENT

State taxation of corporations on a net income basis is less than 50 years old. Started in a practicable way by Wisconsin in 1911, it was adopted by Connecticut, New York, Massachusetts, Missouri, and several other states by 1919. By the end of 1929 it was in operation in 16 states, and by the end of 1939 in 32 states and the District of Columbia. It is now in use in 34 states (South Dakota has given it up in the meanwhile, and 3 others have adopted it) as well as in the District of Columbia and Hawaii. New Jersey adopted it in May 1958 to go into effect in 1959. EXHIBIT I gives the list of states using the tax, the years of adoption, and other information about the manner of application of the tax.

Four main reasons lay behind the wide adoption of this tax:

(1) Most of the states found that their earlier levies on personal property, gross receipts, or capital stock of corporations were thoroughly disappointing in their revenue yields, as well as increasingly inequitable and difficult to enforce fully. They found net income to be a far superior basis for taxing corporations.

(2) The states needed new sources of revenue during periods of high business activity to finance their added expenditure responsibilities and during periods

of depression to make up for the decline in the revenue yields of some of their older taxes.

(3) The increasing use of the corporate form of organization in manufacturing and mercantile businesses made the taxation of corporations particularly lucrative. Such taxation was also politically popular with the rank-and-file voter.

(4) The enactment in 1909 of the federal excise tax on the net income of corporations and in 1913 of the federal corporation income tax as a companion to the federal personal income tax gave impetus to the enactment of similar taxes by the states. These federal enactments, first of all, provided a standard definition of corporate net income which any state could use. Then, too, corporations that were subject to the federal tax would now have records and other information which could be used in the computation of state corporate income taxes as well, making the administration of the state taxes and compliance with them much easier.

Theory Behind Tax

The imposition of state corporation income taxes has been justified from the very beginning as a benefit tax. The benefit is presumed to be represented by the various protective and economic services which the state renders to corporations and which help them to operate and to earn a net income. The net income is supposed to bear some measurable relation to those services. It is also supposed to measure the relative benefits received from the state better than any other aspect of the company's organization or operations.

We accept this theory as reasonable and cannot side with those students of the subject who deny any just foundation for the tax and explain its imposition merely in terms of

EXHIBIT I. CHARACTERISTICS OF CORPORATE NET INCOME TAXES OF 34 STATES AND THE DISTRICT OF COLUMBIA

Region and state	Year adopted	Franchise or direct income tax	Present rate	Is federal tax deductible from net income?	Yield — 1956	
					Million dollars	Per cent of total state revenue
New England						
Connecticut	1915	F	3.75%	No	$28.5	13.9%
Massachusetts	1919	F	6.76	No	20.6	5.4
Rhode Island	1947	D	5	No	7.6	12.5
Vermont	1931	F	5	No	1.9	6.0
Middle Atlantic						
New York	1917	F	5.5	No	223.1	15.6
Pennsylvania	1935	F & D	6	No	137.6	19.6
East North Central						
Wisconsin	1911	D	2.7	Yes	50.8	15.4
West North Central						
Iowa	1934	D	3	Yes	3.2	1.4
Kansas	1933	D	3	Yes	4.4	2.8
Minnesota	1933	F & D	7.3	Yes	20.5	7.2
Missouri	1917	D	2	Yes	*	*
North Dakota	1919	D	3.6	Yes	1.2	1.2
South Atlantic						
Delaware	1957	D	5	No	†	†
District of Columbia	1939	F	5	No	7.5	5.8
Georgia	1929	D	4	No	18.5	6.6
Maryland	1937	D	5	No	23.6	9.4
North Carolina	1921	D	6	No	44.1	12.5
South Carolina	1922	D	5	No	16.3	9.2
Virginia	1916	D	5	No	27.9	12.3
East South Central						
Alabama	1933	D	3	Yes	*	*
Kentucky	1936	D	5.7	Yes	11.9	6.9
Mississippi	1924	D	2.6	No	11.8	7.8
Tennessee	1923	F	3.75	No	13.8	5.5
West South Central						

Iowa	1934	D	3	Yes	3.2	1.4
Kansas	1933	D	3	Yes	4.4	2.8
Minnesota	1933	F & D	7.3	Yes	20.5	7.2
Missouri	1917	D	2	Yes	*	*
North Dakota	1919	D	3.6	Yes	1.2	1.2
South Atlantic						
Delaware	1957	D	5	No	†	†
District of Columbia	1939	F	5	No	7.5	5.8
Georgia	1929	D	4	No	18.5	6.6
Maryland	1937	D	5	No	23.6	9.4
North Carolina	1921	D	6	No	44.1	12.5
South Carolina	1922	D	5	No	16.3	9.2
Virginia	1916	D	5	No	27.9	12.3
East South Central						
Alabama	1933	D	3	Yes	*	*
Kentucky	1936	D	5.7	Yes	11.9	6.9
Mississippi	1924	D	2.6	No	11.8	7.8
Tennessee	1923	F	3.75	No	13.8	5.5
West South Central						
Arkansas	1929	D	1.5	No	8.7	7.4
Louisiana	1934	D	4	Yes	*	*
Oklahoma	1931	D	4	Yes	9.8	4.7
Mountain						
Arizona	1933	D	1.5	Yes	8.5	8.5
Colorado	1937	D	5	Yes	6.1	4.2
Idaho	1931	F	8	Yes	3.7	7.7
Montana	1917	F	5	Yes	3.0	6.1
New Mexico	1933	D	2	Yes	*	*
Utah	1931	F	4	Yes	3.7	3.1
Pacific						
Alaska	1949	D	9‡	No	1.0	5.0
California	1929	F & D	4	No	157.3	10.3
Oregon	1929	F & D	6	No	16.4	10.1

* Data not available.

† No collections yet, since tax was just enacted in 1957.

‡ 18% of allocated federal tax, or approximately 9%.

Sources: Federation of Tax Administrators, *State Income Taxes*, Research Report No. 18 (Chicago, 1946) and *Tax Administrators News*, 1957 and 1958; Prentice-Hall, Inc., *State and Local Tax Service* (New York), current issues; and U. S. Bureau of the Census, *Compendium of State Government Finances in 1956* (Washington, Government Printing Office, 1957).

expediency.[3] A tax which has no foundation in justice is confiscation, and we do not think that the state corporate income tax, as generally imposed today, is confiscation.

In accordance with the benefit theory, the originators of the tax postulated two subsidiary principles for its imposition:

(1) The tax should be applied only to corporations operating property and maintaining permanent business establishments in the state.

(2) It should be applied only to that portion of the company's income that may reasonably be attributed to its productive activities in the state.

These theories were further confirmed, amplified, and given prestige by the recommendations made in 1919 by the National Tax Association's Committee on a Model Plan of State and Local Taxation. At that time only a few states had adopted a corporate net income tax, so the committee had an almost virgin field of taxation to deal with. It laid down two principles in its report:

(1) "Business carried on for profit in any locality should be taxed for the benefit it receives."

(2) "[The state tax] should, except in certain cases, be levied upon the net income derived from business carried on within the state levying the tax.'"[4]

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[3] For elaboration of the benefit theory of business taxation, see Paul Studenski, "Toward a Theory of Business Taxation," *Journal of Political Economy*, October 1940, pp. 622-654.

[4] For the committee's report, see National Tax Association, *Proceedings of the Annual Conference* (New York, 1919), pp. 426 ff. For the Model Plan Act, see *The Bulletin of the National Tax Association*, January 1921, pp. 97-125.

(The exceptions stated were those of small enterprises not taxed federally and those "where apportionment of net income from an interstate business is peculiarly difficult." In these cases a tax of a flat amount or one on gross receipts was considered acceptable.)

Allocation Formulas

In 1920 a subsidiary committee was established by the National Tax Association to develop the details of the Model Plan.[5] The committee strongly recommended that only corporations having property in the state or a regular place of business through which orders are negotiated and accepted should be taxed by a state, and that the mere solicitation of sales in the state does not provide a sufficient basis for the imposition of the tax.

In devising the allocation formula for the imposition of the tax, the committee endeavored to reconcile the interests of the manufacturing and the merchandising states. It did not agree with the formula used by Massachusetts, under which one-third weight was given to each of these three factors: location of tangible property, amount of the payroll, and receipts from sales. Nor did it agree with the recommendation of the original committee on the Model Plan, under which two-thirds weight was given to the location of the company's tangible property and only one-third weight to the receipts from sales.

The committee recommended what it called "a middle ground," giving the two factors of property and business equal weight. It urged "that the business factor be measured by the sum of the amounts paid out by the taxpayer for labor and material plus the amount of the receipt from the sale of the goods and products dealt in, including incidental receipts," contending that "business activity is

[5] For the committee's report, see National Tax Association, *Proceedings of the Annual Conference* (New York, 1922), pp. 198-222.

measured both by income and outgo." The proposed formula thus constituted a compromise between the formulas then being used by Wisconsin, New York, and Massachusetts. With regard to the allocation of the business factor, the committee stated:

> "The general principle back of allocating all of these elements would seem to be that *they must be assigned to some regular place of business of the company. A fringe of business activity may extend out to a considerable distance from every place of business. For example: travelers may be sent to other states for the purpose of soliciting orders or making purchases, but for practical purposes no income can be attributed to these outlying points where the customers or parties negotiated with are located. . . . All of the income should be allocated to some place where it is feasible and practicable to tax it; that is, to some place of business of the taxpayer. Any portion of the income allocated to a state where there is no place of business; the only activity being that of travelers, would be practically immune from taxation.*
>
> "From the draft law attached it will be seen that wage and salary payments are to be assigned to the office at which the employee chiefly works or from which he is sent out. Similarly *purchases and sales are assigned to the office at or from which they are chiefly negotiated and executed.* . . . A sale may involve solicitation of the order, acceptance, shipment of goods, carrying an account with the customer on the books, collecting the purchase price and general correspondence with the customer. It seems to the Committee that *no one of these elements is sufficient to outweigh all of the others.* . . ." [Italics added]

The development of state corporate income tax legislation during the succeeding 20 or more years conformed

closely to the position implied by the two committees of the National Tax Association insofar as state jurisdiction to apply the tax was concerned. But it did not follow their recommendations as to a particular uniform allocation formula. Differences in the nature of their economies prompted the states to adopt different formulas, each calculated to produce the largest possible revenue or to suit the particular circumstances best. The danger of unfair double taxation of corporations, therefore, was not prevented.

In fact, in 1939 another committee of the National Tax Association, which was struggling with this same problem of uniformity of allocation, reported 16 different allocation formulas in use by the 32 states then levying corporate income taxes.* These formulas were as follows:

Factors	Number of states using these factors
Property, payroll, sales	10
Property, manufacturing costs, sales	7
Property, sales	8
Sales	8
Property, manufacturing costs	1
Property, cost of sales, sales	1
Property, payroll	2
Property, shares of other corporations, accounts receivable	1
Property, payroll, sales, purchases	1
Property	1
Manufacturing costs	1
Marketing costs	1
Property, payroll, sales, manufacturing costs	1
Costs of sales	1
Property, payroll, purchases	1
Loans, wages, interest	1

The differences in allocation formulas have been even greater than is suggested by the foregoing list, since sales have also been variously defined. In some formulas, sales are identified as receipts at the office in which they are ne-

*National Tax Association, *Proceedings of the Annual Conference* (New York, 1939), p. 193.

gotiated, in others as receipts at the place at which the goods are located, in still others as receipts at the place of the acceptance of orders, in quite a few as receipts at the place from which goods are shipped, and so forth. Moreover, different formulas have sometimes been used in the same state for different types of companies.

OPERATION APPRAISED

Corporation income taxes levied only on firms operating properties in the state, keeping stores of goods there, or maintaining offices there in which orders are accepted have operated fairly well from the point of view of the states, the corporate taxpayers, and the national interest.

Substantial Revenue

The taxes shown in Exhibit 1 returned more than $900 million of revenue to 34 states and the District of Columbia in 1956. More than two-thirds of this revenue was collected by the 10 manufacturing states of New York, California, Pennsylvania, Wisconsin, North Carolina, Connecticut, Virginia, Maryland, Massachusetts, and Minnesota. In each of these 10 states such collections amounted to between 10% and 20% of the entire state tax revenue. In the other 24 states the tax is much less important, providing in some cases only about 1% of the state tax revenue, and in others a maximum of 10%.

The taxes have produced an expanding revenue for the states during periods of high business activity and a diminishing revenue during periods of business contraction. This instability of yields does have certain disadvantages from the point of view of a state, but from a broad national standpoint it is a commendable feature because it helps to stabilize the national economy and to coordinate state fiscal policy with federal fiscal policy toward the achievement of this goal. The unfavorable effect of this instability on a

state's ability to finance its expenditures can be taken care of by the establishment of state revenue stabilization reserves in which surplus revenue would be stored during boom periods and from which money would be withdrawn during periods of depression.

The cost of administering state corporate income taxes has been comparatively low, ranging from about 1% in New York, where an especially large portion of the tax is collected from a small number of large taxpayers and where the structure of the tax is comparatively simple, to 5% in some other states, in which the situation in these respects is less favorable.

Compliance with the taxes, though far from being easy, has been manageable up to now because under the jurisdictional concept used in most states the majority of corporations have had to pay a tax to comparatively few states.[7]

Aggregate Impact

In an effort to ascertain the impact of state corporation income taxes, a questionnaire was addressed to 100 selected manufacturing companies, mostly large and medium-size, and a number of executives of these and other companies were interviewed. The type of information essential to a competent appraisal of the operations of state taxes, but not generally available, was thereby obtained for a number of different companies.

For convenience of illustration 25 companies representing different manufacturing industries and situations were selected for a more detailed analysis; the more important information obtained from them is presented in Exhibits II, III, and IV. It is not claimed that these 25 companies are a completely accurate sample of American manufacturing in-

[7] See Albert H. Cohen, *Apportionment and Allocation Formulae . . .* (New York, Controllership Foundation, Inc., 1954).

dustry affected by state corporation income taxation. For one thing, the group does not contain enough small corporations. However, this should be a fair picture of how a substantial number of manufacturing corporations are affected by state income taxes. The following points are of interest:

As seen from EXHIBIT II, of the 25 companies, 16 have their properties concentrated in 1 to 5 states, 5 in 6 to 10 states, and only 4 have properties in more than 10 states. Moreover, as EXHIBIT III shows, 14 of the 25 have from 90% to 100% of their properties located in a single state, and, on the other hand, only 2 have less than 50% of their properties so located.

The payrolls of these companies are also concentrated in a few states, although not quite to the same degree. Thus, of the 22 companies for which such statistics are available, 12 have from 80% to 100% of the payrolls concentrated in a single state, 6 have from 50% to 80% so concentrated, and only 4 have less than 50% concentrated in any single state.

The sales offices of most of these companies show a fairly high degree of concentration, but less than either plants or payrolls. Of the 25 companies, 12 have sales offices in at most 2 states and do their selling in the others either through resident salesmen or, in most instances, non-resident salesmen. However, 7 have sales offices in 10 or more states.

Contrasted with this substantial concentration of properties and payrolls, and moderate concentration of sales offices in a few states, is the wide dispersion of sales across the national market. It will be noted that 21 of the companies sell goods in *all* of the states and in the District of Columbia, 3 in 38 to 43 states, and only 1 sells in a limited area of 7 states. For the 19

companies for which complete sales data are available, only 3 companies have more than one-quarter of their sales concentrated in a single state. Four companies sell in some states by mail order. One of them uses this method in all areas but its home state.

The concentration of properties, payrolls, and regular sales offices in a few states has up to now considerably limited the susceptibility of the 25 companies to state income taxes. It is not surprising, therefore, to

EXHIBIT II. DISTRIBUTION BY STATES OF PROPERTIES, SALES, AND NET INCOME TAX PAYMENTS OF 25 MANUFACTURING COMPANIES

Company by size* and type of product	Number of states‡ in which the company: Has property (plants, inventories, etc.)	Sells goods	Maintains sales offices	Employs resident salesmen	Employs non-resident salesmen	Pays state net income taxes	Per cent of company's net income subject to state net income taxes
Small							
1. Machinery	1	49	0	19	30	1	100.0%
2. Furniture	1	7	1	0	0	1	100.0
3. Chemical	12	49	16	1	19	4	†
Medium							
4. Tools	3	49	2	10	37	2	101.5
5. Machinery	1	49	0	8	41	2	†
6. Chemical	1	49	1	27	21	2	100.3
7. Leather	2	43	2	1	37	3	62.0
8. Paper	1	38	0	32	4	3	5.1
9. Textiles	5	49	6	7	36	3	69.0
10. Electrical machinery	5	49	7	9	33	2	98.8
11. Tiling	6	40	5	7	28	4	94.9
12. Iron & Steel products	3	49	2	15	32	1	91.4
13. Furniture	1	49	0	21	28	1	100.0
14. Food products	2	49	3	†	†	1	78.8
Large							
15. Nonferrous metals	2	49	10	7	32	1	8.6
16. Writing instruments	1	49	1	27	21	3	5.4
17. Furniture	11	49	5	12	32	8	69.2
18. Electrical machinery	8	49	44	0	5	5	100.5
19. Drugs	38	49	36	0	13	27	62.5
20. Textiles	7	49	12	1	36	7	65.9
21. Apparel	10	49	4	45	0	8	43.4
22. Apparel	2	49	1	15	33	2	85.8
23. Food products	10	49	25	20	4	7	39.0
24. Automobile parts	14	49	16	12	21	10	64.1
25. Apparel	1	49	†	32	16	3	103.2

* Size classifications are: small—annual sales under $2 million and less than 200 employees; medium—annual sales from $2 million to $25 million and from 200 to 1,000 employees; large—annual sales over $25 million and over 1,000 employees.

† Data not available.

‡ Including District of Columbia; excluding Alaska (not a state at time of survey).

Company by size* and type of product	Number of states‡ in which the company: Has property (plants, inventories, etc.)	Sells goods	Maintains sales offices	Employs resident salesmen	Employs non-resident salesmen	Pays state net income taxes	Per cent of company's net income subject to state net income taxes
Small							
1. Machinery	1	49	0	19	30	1	100.0%
2. Furniture	1	7	1	0	0	1	100.0
3. Chemical	12	49	16	1	19	4	†
Medium							
4. Tools	3	49	2	10	37	2	101.5
5. Machinery	1	49	0	8	41	2	†
6. Chemical	1	49	1	27	21	2	100.3
7. Leather	2	43	2	1	37	3	62.0
8. Paper	1	38	0	32	4	3	5.1
9. Textiles	5	49	6	7	36	3	69.0
10. Electrical machinery	5	49	7	9	33	2	98.8
11. Tiling	6	40	5	7	28	4	94.9
12. Iron & Steel products	3	49	2	15	32	1	91.4
13. Furniture	1	49	0	21	28	1	100.0
14. Food products	2	49	3	†	†	1	78.8
Large							
15. Nonferrous metals	2	49	10	7	32	1	8.6
16. Writing instruments	1	49	1	27	21	3	5.4
17. Furniture	11	49	5	12	32	8	69.2
18. Electrical machinery	3	49	44	0	5	5	100.5
19. Drugs	38	49	36	0	13	27	62.5
20. Textiles	7	49	12	1	36	7	65.9
21. Apparel	10	49	4	45	0	8	43.4
22. Apparel	2	49	1	15	33	2	85.8
23. Food products	10	49	25	20	4	7	39.0
24. Automobile parts	14	49	16	12	21	10	64.1
25. Apparel	1	49	1	32	16	3	103.2

* Size classifications are: small—annual sales under $2 million and less than 200 employees; medium—annual sales from $2 million to $25 million and from 200 to 1,000 employees; large—annual sales over $25 million and over 1,000 employees.

† Data not available.

‡ Including District of Columbia; excluding Alaska (not a state at time of survey).

find that 16 firms pay net income taxes in only 1 to 3 states, 3 companies in 4 to 5 states, 4 in 6 to 8 states, 1 in 10 states, and 1, which represents an exceptional situation, pays the tax in a fairly substantial number

EXHIBIT III. DEGREE OF CONCENTRATION OF PROPERTY, PAYROLLS, AND SALES IN 25 MANUFACTURING COMPANIES.

(Maximum percentages in any single state)

Company by size* and type of product	Property	Payroll	Sales
Small			
1. Machinery	100.0%	84.9%	8.1%
2. Furniture	100.0	100.0	70.0
3. Chemical	80.0	90.0	†
Medium			
4. Tools	94.0	96.0	13.7
5. Machinery	100.0	†	†
6. Chemical	100.0	19.0	17.3
7. Leather	87.0	77.0	40.9
8. Paper	100.0	72.4	20.3
9. Textiles	87.0	86.0	16.2
10. Electrical machinery	77.4	89.9	30.2
11. Tiling	95.2	88.9	17.0
12. Iron & steel products	99.5	98.1	21.0
13. Furniture	99.2	†	15.8
14. Food products	98.5	94.3	15.0
Large			
15. Nonferrous metals	100.0	65.7	12.5
16. Writing instruments	100.0	†	9.0
17. Furniture	44.3	44.3	18.1
18. Electrical machinery	87.4	88.6	†
19. Drugs	13.9	16.6	14.9
20. Textiles	62.8	68.4	†
21. Apparel	65.1	56.4	8.2
22. Apparel	98.0	95.3	†
23. Food products	25.1	38.6	8.3
24. Automobile parts	54.0	68.0	20.0
25. Apparel	99.9	92.9	12.5

* See Exhibit II.
† Data not available.

of states. However, 9 firms have been subjected to taxation in 1 or 2 states on the basis of sales solicitation only.

Of the 23 companies for which complete data on state income tax payments are available, 4 are assessed on *more* than 100% of their net income because of divergent and overlapping allocation formulas, and 3 pay on

Company by size* and type of product		Property	Payroll	Sales
Small				
1.	Machinery	100.0%	84.9%	8.1%
2.	Furniture	100.0	100.0	70.0
3.	Chemical	80.0	90.0	†
Medium				
4.	Tools	94.0	96.0	13.7
5.	Machinery	100.0	†	†
6.	Chemical	100.0	19.0	17.3
7.	Leather	87.0	77.0	40.9
8.	Paper	100.0	72.4	20.3
9.	Textiles	87.0	86.0	16.2
10.	Electrical machinery	77.4	89.9	30.2
11.	Tiling	95.2	88.9	17.0
12.	Iron & steel products	99.5	98.1	21.0
13.	Furniture	99.2	†	15.8
14.	Food products	98.5	94.3	15.0
Large				
15.	Nonferrous metals	100.0	65.7	12.5
16.	Writing instruments	100.0	†	9.0
17.	Furniture	44.3	44.3	18.1
18.	Electrical machinery	87.4	88.6	†
19.	Drugs	13.9	16.6	14.9
20.	Textiles	62.8	68.4	†
21.	Apparel	65.1	56.4	8.2
22.	Apparel	98.0	95.3	†
23.	Food products	25.1	38.6	8.3
24.	Automobile parts	54.0	68.0	20.0
25.	Apparel	99.9	92.9	12.5

* See Exhibit II.
† Data not available.

100% of their net income; 11 pay on from 60% to less than 100% of their net income, and 5 pay on less than 60%—3 of these 5 paying on less than 10% of their net income.

It should be remembered, however, that some of the companies own properties and conduct business activities in states which have no corporate income taxes but which tax them on their gross receipts, capital stock, or personal property. The fact that only a small percentage of net income is taxed under all the state corporation income taxes does not necessarily mean that a company is escaping its fair share of taxation. For example, the three companies in our group which pay income taxes on less than 10% of their net income do so because their manufacturing plants and properties are concentrated in states that either do not levy a corporate income tax or that apply it on the basis of a sales-allocation factor alone. These companies are taxed on different bases—and not necessarily lightly—in their home states.

The various data presented in these tables generally substantiate the conclusion advanced above that state corporation income taxes, as applied mostly under the traditional jurisdictional concept, have not resulted in serious double taxation. Although cases of companies being taxed on 150% or more of their net income undoubtedly exist, our limited survey has not brought any to light.

RECENT DEPARTURES

Attempts to depart from the original jurisdictional approach to state corporation income taxation were made by some states in the 1920's and 1930's, but all these early attempts were either declared invalid in the courts or, because they were not enforced, were never challenged. For example:

The Massachusetts excise tax of 1919 was designed to tax the net income of out-of-state corporations maintaining sales offices in the state even though orders solicited through them had to be approved by the home office in another state. The law was immediately challenged in the courts and in 1925 was held void by the Supreme Court of the United States on the ground that it violated both the commerce clause and the due process clause.[8]

Postwar Trend

It was only after World War II that the trend away from the original method of application of the tax became pronounced. For example:

After Minnesota enacted a law in 1933 making its income tax on corporations applicable to firms whose business within the state consisted "exclusively of interstate commerce," and added amendments to the statute in 1937 and 1945, it began to apply its tax to out-of-state corporations engaged exclusively in the solicitation of orders in the state. One outgrowth of this enforcement has been the case of *State of Minnesota* v. *Northwestern States Portland Cement Co.*, now before the U. S. Supreme Court, in which the constitutionality of this law is at issue. (The substance of the case was outlined earlier in the article.)

California supplemented its corporate franchise tax in 1937 with a direct corporate tax on income derived "from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce." The California Supreme Court up-

[8] *Alpha Portland Cement Company* v. *Commonwealth of Massachusetts*, 268 U. S. 203. See also Harold S. Lyon, "State Taxation of Foreign Corporations Engaged in Interstate Commerce," *The Bulletin of the National Tax Association*, February 1925, p. 137.

held the law in 1946, and, on an appeal that same year, the Supreme Court of the United States upheld it, too, but without writing an opinion.[9] Following this favorable decision, the state applied its direct corporate income tax to out-of-state corporations that engaged only in interstate commerce and merely solicited orders within the state.

After World War II, several states amended their existing corporate income tax laws or re-interpreted them to apply these taxes on the same broad basis as California. Among them were Arkansas and Colorado, in 1947; Georgia, Pennsylvania, and Connecticut, in 1950 and 1951; and Arizona, in 1954. Pennsylvania's action was stopped in 1956 by a decision of the highest court of the state, which invalidated this type of taxation on constitutional grounds,[10] but the new taxes are now being collected in a determined way by Minnesota, California, Oregon, Georgia, and Louisiana. Several other states, including Vermont and Mississippi, currently are following this lead.

Various factors seem to have been responsible for this postwar trend. First of all, the states have found themselves increasingly cramped in their taxing powers by the recent heavy concentration of taxation on the federal level. Secondly, the so-called market states are increasingly begrudging of the large amounts of revenue that the more industrialized states obtain from corporate net income taxes. Finally, some states with a growing manufacturing economy have sought to lighten the tax burden on their own companies by applying their taxes to out-of-state corporations, and hope that in this way they will induce others to establish permanent manufacturing operations in the states.

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[9] *West Publishing Company* v. *McColgan*, 328 U. S. 823.

[10] *Pennsylvania* v. *Eastman Kodak Co.*, 385 Pa. 607; 124 A. 2d 100.

While thus extending the jurisdictional basis of their corporate net income taxes, the states in question have also been changing their allocation formulas by substituting sales-by-destination or sales-by-site-of-solicitation for sales processed at the home or regional offices of the company, or for other traditional definitions of sales. This change in the allocation formula was necessary in order to ensure to the states the full benefit of the extension of the jurisdictional basis of their corporate income taxes.

Even states that have not extended the jurisdictional basis have started to change their allocation formulas in this way. Some of them—North Carolina and South Carolina, for example—have shifted to the sales-by-destination factor in order to lower the burdens of net income taxes on local firms producing mostly for sale in other states. They have deliberately sacrificed revenue to attract more companies to locate manufacturing plants in their areas.

In recent years many corporations have come to favor the shift to the sales-by-destination factor in the allocation formulas, while opposing the extension of state corporate income taxes to out-of-state corporations engaged exclusively in interstate commerce and in solicitation of orders in the state. They seem to favor this allocation factor because of an expectation that their own state corporate income taxes would then be reduced.

Will this expectation be realized? Only if the traditional jurisdictional basis of the taxes is retained. It will *not* be realized if the states are permitted to tax out-of-state corporations that engage solely in interstate business and in solicitation. For example:

> If subject only to New York taxes, manufacturing corporations maintaining their home offices and inven-

tories in the Empire State would be paying less under the sales-by-destination criterion than they are now paying under the sales-by-origin-of-shipments criterion, while at the same time in those states in which they merely solicit orders and sell goods they would not be paying any corporate income taxes. But if this jurisdictional basis were changed, and New York corporations became subject also to income taxes in the states where they sell goods, they undoubtedly would be paying even *more* than they are now.

It is quite clear that New York will not shift to the sales-by-destination basis, since it would stand to lose as much as $20 million in tax revenue. If it should continue to levy its corporate income tax on a sales-by-origin-of-shipments basis while other states tax the income of New York's corporations on a sales-by-destination basis, these firms will be paying double taxes on the same amount of income. This fact is generally overlooked by those New York corporations that readily endorse the sales-by-destination factor.

In recent years the states and corporations which favor the sales-by-destination factor have been attempting to get those national associations which have long advocated uniform allocation formulas (particularly the National Tax Association) to incorporate the sales-by-destination concept in their recommendations in place of more traditional views. Thus, in 1939 the National Tax Association's Committee on the Allocation of Income, under the chairmanship of Leo Mattersdorf, recommended the partial use of the sales-by-destination factor,[11] and in 1951 a similar committee, under the chairmanship of Jack Miller, recommended a fuller use of this factor.[12] In 1957 a committee of the National Con-

[11] National Tax Association, *Proceedings of the Annual Conference* (New York, 1939), pp. 190-236.

[12] National Tax Association, *Proceedings of the Annual Conference* (New York, 1951), pp. 451-465.

ference of Commissioners on Uniform State Laws drew up a "Uniform Division of Income for Tax Purposes Act" for adoption by the various states, which incorporated the sales-by-destination factor in its apportionment formula.

FALLACIOUS ARGUMENTS

The contention that a state has a rightful claim to tax out-of-state corporations which own no property in the state and carry on none of their productive activities in it, but which merely solicit orders and ship goods to customers, rests on a very weak, if not nonexistent, principle of equity. Indeed, taxation of this kind seems to be largely no more than the reaching out by some states into the fiscal resources of other states:

> States that are primarily markets rather than suppliers will be diverting to themselves for taxation purposes a portion of the corporate income belonging to states which are primarily producers.
>
> States whose enterprises are less efficient and earn less net income will be raising revenue through the taxation of the more efficient and successful enterprises of other states.
>
> States that render fewer services to their home enterprises and are less efficiently governed will be reaping the fruits of the more bountiful services rendered by the other states to their home companies.

It is difficult to conceive how the nation's economy can possibly gain from such haphazard transfers of revenue resources from economically more efficient and better managed states to economically less efficient and more poorly managed ones. It seems much more likely that the national economy will lose from such a reshuffling of state revenue resources. Note that this is quite a different matter from the redistribution of revenue resources accomplished by the federal government when it concentrates its taxation in the

more prosperous states and grants aid to the poorer ones for the maintenance of certain minimum standards of social services. Such a redistribution is controlled and is undertaken with a purposeful eye toward the national benefit.

One of the apparent purposes of the extension of state corporate income taxes to out-of-state corporations which merely solicit orders in the state and of the shift to the sales-by-destination factor is to soften the income tax burden on home companies, thereby inducing home companies to remain in the state and outside companies to relocate or open branches there. But are such reductions in taxation really great enough to produce the intended results? Even if the tax inducements are effective, it is not at all certain that the resultant relocations of industry would increase the efficiency or profits of the companies involved. Moreover, if every state were to offer these inducements, none would get the advantage, and practically every one would lose revenue.

One of the main arguments advanced in favor of the extension of these new taxes is that they help to equalize the tax burdens between home companies and out-of-state companies. It is argued that the traditional jurisdictional basis places home companies at a competitive disadvantage because the state taxes which they must pay are not applied to their out-of-state competitors.

To be sure, a competitor may manufacture in a state with very low taxes. Theoretically it is possible for a sizable differential to exist. But as a practical matter this argument lacks force. The great majority of companies in interstate commerce compete with firms which must pay similar taxes. Take the states accounting for most industrial activity, and you will find unimpressive differentials in the aggregate impact of each government's taxes on companies under its jurisdiction.

Moreover, even where a competitive disadvantage does

exist, it in itself would not be sufficient to justify the imposition of a tax on the out-of-state companies. To warrant this imposition, the state must be able to demonstrate that it furnishes the same services to the out-of-state companies that it does to its own. Otherwise it would violate the rules of economic equity and of constitutional law.

RESULTING PROBLEMS

Not only are there many fallacies in the thinking behind the new tax trend, but there are also many problems which arise. The corporation will have difficulty in complying with the new regulations, while the state will have trouble in administering them. In addition, the taxes may interfere with interstate commerce, thus weakening the national economy.

Difficulties for Business

The new philosophy would operate to make all companies engaged in interstate commerce subject to income taxation in many more states than they are today. As Exhibit IV shows, of the 25 companies covered by this survey only 5 pay corporate income taxes in more than 5 states on the traditional jurisdictional basis. But under the rule which the Supreme Court is being asked to approve, the number of states to which these 25 companies would have to pay income taxes would be increased as follows:

If the taxes are applied to sales offices soliciting orders, 9 out of 25 will pay them to more than 5 states.

If the taxes are applied to the maintenance of resident salesmen, 22 out of the 25 will pay them to more than 5 states.

If the taxes apply to the employment of non-resident salesmen, 24 out of the 25 will pay them to more than 5 states.

The average number of states to which a company would have to pay these taxes would be doubled in the first case,

EXHIBIT IV. NUMBER OF STATES IN WHICH 25 MANUFACTURING CORPORATIONS WOULD BE SUSCEPTIBLE TO NET INCOME TAXES UNDER DIFFERENT JURISDICTIONAL CONCEPTS

Company by size* and type of product	Number of taxing states			
	On traditional basis	Based also on location of sales offices	Based also on location of resident salesmen	Based also on activities of nonresident salesmen
Small				
1. Machinery	1	1	15	34
2. Furniture	1	1	1	1
3. Chemical	4	11	11	30
Medium				
4 Tools	2	2	7	33
5. Machinery	1	1	6	34
6. Chemical	1	1	19	34
7. Leather	2	3	4	34
8. Paper	3	3	23	26
9. Textiles	3	3	6	34
10. Electrical machinery	3	5	6	34
11. Tiling	4	4	7	28
12. Iron & steel products	1	2	11	34
13. Furniture	1	1	14	34
14. Food products	1	3	†	34
Large				
15. Nonferrous metals	1	7	12	34
16. Writing instruments	3	3	34	34
17. Furniture	8	10	12	34
18. Electrical machinery	3	32	32	34
19. Drugs	27	27	27	34
20. Textiles	5	13	13	34
21. Apparel	6	6	34	34
22. Apparel	2	3	13	34
23. Food products	7	25	34	34
24. Automobile parts	10	14	18	34
25. Apparel	1	2	23	34

* Size classifications are: small—annual sales under $2 million and less than 200 employees; medium—annual sales from $2 million to $25 million and from 200 to 1,000 employees; large—annual sales over $25 million and over 1,000 employees.

† Data not available.

quadrupled in the second, and increased eightfold in the third case. In the last case all but one firm (which sells outside its home state on a mail order basis only) would be paying these taxes in more than 26 states.

Difficulties of Compliance

This radical expansion in the number of states in which companies would have to file income tax returns and pay

Company by size* and type of product	Number of taxing states			
	On traditional basis	Based also on location of sales offices	Based also on location of resident salesman	Based also on activities of nonresident salesmen
Small				
1. Machinery	1	1	15	34
2. Furniture	1	1	1	1
3. Chemical	4	11	11	30
Medium				
4 Tools	2	2	7	33
5. Machinery	1	1	6	34
6. Chemical	1	1	19	34
7. Leather	2	3	4	34
8. Paper	3	3	23	26
9. Textiles	3	3	6	34
10. Electrical machinery	3	5	6	34
11. Tiling	4	4	7	28
12. Iron & steel products	1	2	11	34
13. Furniture	1	1	14	34
14. Food products	1	3	†	34
Large				
15. Nonferrous metals	1	7	12	34
16. Writing instruments	3	3	34	34
17. Furniture	8	10	12	34
18. Electrical machinery	3	32	32	34
19. Drugs	27	27	27	34
20. Textiles	5	13	13	34
21. Apparel	6	6	34	34
22. Apparel	2	3	13	34
23. Food products	7	25	34	34
24. Automobile parts	10	14	18	34
25. Apparel	1	2	23	34

* Size classifications are: small—annual sales under $2 million and less than 200 employees; medium—annual sales from $2 million to $25 million and from 200 to 1,000 employees; large—annual sales over $25 million and over 1,000 employees.

† Data not available.

corporate income taxes each year would greatly increase the difficulties and costs of compliance for all those companies that are extensively engaged in interstate commerce. Compliance with 30 or more state corporate income tax laws, each differing in its basis of imposition and allocation of income, might not be too difficult or costly for large corporations that maintain substantial permanent staffs of trained tax accountants and tax lawyers. But it would be a substantial burden for the small and medium-size corporations that would have to hire outside help.

In the course of this survey several tax accounting firms have been asked whether they have been called on recently to prepare state corporation income tax returns in cases where the tax was assessed solely on the ground that a company solicited orders in the state. If they did prepare such returns, they were further asked to specify the amounts of the taxes involved and also the charges made to the clients for the work performed. The replies indicated that some accounting firms had a number of such cases and that the charges for the preparation of some of these returns exceeded by a wide margin the amounts of the taxes involved. Here is what one such firm had to report:

> "We have three fairly typical situations. These three corporations are of medium size, three to four million dollar sales volume per year, and are currently complying with state tax requirements similar to those [mentioned]. Their only activity within the taxing state is a salesman employee who solicits orders.
>
> "Corporation A has complied with the particular state's requirements for three years. The average tax paid is approximately $75. The average cost to properly prepare complete tax returns is approximately $150 per return.
>
> "Corporation B has complied for six years. In this case the average tax amounts to under $20. This ex-

tremely low figure is partially the result of two loss years with no minimum filing fee. The average cost to properly prepare these complete tax returns is also approximately $150.

"In both cases A and B above, no attempt has been made to file returns for years prior to the date of initial compliance.

"Corporation C has filed twelve such returns with an average tax of $46. In this case after complying with the particular state's request, the corporation filed eight returns at one time covering prior years. These eight returns were in skeleton form with many of the required schedules and computations omitted. Therefore, the average cost per return in this case is approximately $100."

Compliance is often not limited to the mere filing of a return, and extensive records must be kept for allocation purposes. Additional information must also be presented to the tax examiners in subsequent return audits and adjustment negotiations. Furthermore, expensive litigation with the states may sometimes be involved, and the possibilities for the harassment of the corporate taxpayer under these broadened applications of state net income taxation will be increased greatly.

Such a vast rise in the number of states to which corporations would have to pay corporate income taxes would greatly increase the possibility of double and multiple taxation of corporations, since the different states undoubtedly would continue to use different allocation formulas. It is exceedingly unlikely that in the years to come the states will be able to achieve much uniformity in allocation when they have failed to do so in the past. In other words, if we follow the newly projected course, we will be multiplying the cases of double taxation instead of limiting them.

As stressed earlier, the only barrier to double and multiple taxation in the development of state corporate income taxation so far has been the traditional jurisdictional basis of its application. The removal of this guard can only result in more numerous and far harsher instances of unfair double taxation.

Costs of Administration

The difficulties of administering state corporate income taxes will also be greatly increased under the new mode of application. It is difficult enough for state tax administrators to secure complete compliance under the traditional jurisdictional basis from the multitude of large and small corporations regularly operating in their state. These difficulties would be multiplied tremendously if the taxes had to be applied to an even larger number of out-of-state corporations that solicit orders in and ship goods to the state. It has been estimated by one tax administrator that he would have to employ 5,000 people to police the enforcement of the corporate income tax on the multitude of out-of-state corporations, small and large, shipping their goods into the state on orders received through agents. This would be many times the number now employed by his department for the enforcement of *all* the state's taxes.

Undoubtedly most of the states extending their income taxes to such out-of-state corporations would find complete enforcement much too expensive and administratively impractical. They would tend to limit the application of the tax in administrative practice, if not in the wording of their laws, to the bigger corporations where the amount obtained would be large enough to justify the effort. Tracking down in-state sales of the smaller out-of-state corporations is a time-consuming task and defies systematic effort even at that. It necessitates inquiries among the dealers who purchase goods, examination of advertising in newspapers, searches through telephone books, and other devices

calling for special detection abilities. In most cases tax administrators would find their efforts unrewarding.

The experience of the several states that have recently adopted the new concept fully confirms this conclusion. Their practice has been to concentrate on the larger out-of-state companies and to let the others alone. Thus, for example, under its direct net income tax California taxes only about 1,000 out-of-state corporations, collecting from them an average of $650 per taxpayer.[13] There are undoubtedly many more out-of-state corporations to which the tax could be applied if the letter of the law were followed.

None of these states has so far legally exempted small out-of-state corporations from the application of the tax, and it is doubtful that a state could constitutionally establish such an exemption without making it equally applicable to its home companies. Furthermore, the administration of the exemption would be quite difficult. Under the circumstances, tax administrators would have to exercise considerable discretion in applying their state's tax to some out-of-state corporations and in not applying it to others.

It is clear, therefore, that the new mode of application of state corporate net income taxes can be only arbitrarily administered, and that many out-of-state corporations will be operating under continuous uncertainty about their vulnerability to a tax assessment and to payments of arrears and penalties. The scope for both bargaining and litigation would be tremendously increased.

Effect of Interstate Commerce

The new concept will also interfere seriously with the free flow of interstate commerce upon which the prosperity of our economy is founded. The imposition of the tax in a

[13] State of California Franchise Tax Board, *Annual Report 1956* (Sacramento), p. 81.

market state is equivalent to a requirement that the corporation take out a license for a right to sell goods in the state. While it may not stop a large corporation from selling goods in the state, it may stop many medium-size or small corporations from doing so. The sales solicited by such a corporation may not be large enough to justify paying a tax and filing a return or to risk back assessments for the years when the company may have been selling goods in the state under the assumption that it was not subject to the tax.

As a result, many corporations may very well limit their sales to a regional rather than a national market, with a consequent curtailment of interregional competition and of the efficient interregional use of the country's economic resources. A good part of the unity of our national market would be destroyed for the first time in the history of our country. Actually, in the whole 170 years that have elapsed since the adoption of the federal constitution—which prohibited the erection of tariff barriers by the states and established one single national market—there has not been a comparable attempt at interference with interstate commerce.

The whole structure of distribution of manufactured goods may be changed fundamentally, but not advantageously, as a result of these interferences with interstate commerce, since many corporations may organize subsidiaries, dispense with sales agents, or sell through distributors to avoid the harassing state impositions. In this way the efficiency of the national economy would be reduced.

The company executives interviewed or otherwise contacted in the course of this study expressed grave concern over the adverse effects which wider use of this innovation in state business taxation might have on their ability to carry on business throughout the country. Quite a number of companies indicated that they would seriously consider making substantial alterations in their whole sales organi-

zations and activities if taxed on such a basis. Medium-size and small concerns were particularly emphatic in this respect. The following are representative samples of responses to our questionnaire:

"We might well have to abandon or drastically change our sales methods. Possibly we would try to work through sales agencies or sell direct without a sales force. Taxation of income by the various states and a duplication of such taxation by our home state would be financially intolerable."

"We would sell to some organization in that state for resale by them to users and endeavor to have all sales qualify as interstate commerce sales."

"If such states were far removed from our plant, we might possibly withdraw from doing business in them, because of this additional cost on top of high freight equalization costs."

"We might have to consider other channels of distribution."

"We would try to sell more locally and cut out other states."

"Records by states would have to be kept for the first time—they would act as a deterrent in marginal profit states."

"It would cause us to examine the value of states from a sales and profit standpoint and perhaps stop sale in certain marginal states."

CONCLUSION

From an economic point of view it must be concluded that the application of corporate income taxes by states to

firms which merely solicit business in the state, whether through a local office, a resident salesman operating from his home, or nonresident traveling salesmen, is unwise. The reasons are as follows:

(1) Where an out-of-state company's activities are confined to solicitation, its contact with the state is too remote and its receipt of benefits from the state, if any, are too inconsequential to consider it an integral part of that state's economy and to justify, on any principle of equity, any levy as direct and pervasive as the net income tax.

(2) Companies that are extensively engaged in interstate commerce will have to file annual returns and pay income taxes to a multitude of states in which they conduct very little business. This will increase the difficulties of compliance because of the different methods used by the states in imposing these taxes and in allocating income under them. It will compel many corporations, especially of small and medium size, to restrict their sales to a few states, with the result that interstate commerce will be impeded and the efficiency of the national economy will be lowered.

(3) The possibilities of double and multiple taxation of companies on the same net income will be greatly increased. Thus, that degree of relative equitableness which it has taken the states many years to achieve will be destroyed.

(4) Levying income taxes on such companies represents the taxing by some states of income produced by the capital and labor employed in other states with the aid of the services rendered by these other states. This constitutes an uncontrolled and often wholly unwarranted redistribution of tax resources not calculated to produce any discernible national advantage.

(5) Finally, the administration of these taxes will be much more difficult and arbitrary, and will necessarily result in a considerable amount of evasion and litigation.

Companies not directly engaged in manufacturing in a state should be required to pay taxes there on a net income basis only if they maintain regular and permanent administrative and sales offices authoritatively representing them, and if they conduct more extensive and direct business operations through these offices than the mere solicitation of orders. Such operations may include different functions in different types of companies. They may embrace the adjustment and collection of accounts, the care of customers' complaints, the servicing of the company's installations, the display of goods for sale, the definite acceptance of orders and filling them from stocks on hand, the sending out of salesmen to surrounding states, and so on. How many such activities would have to be conducted to make a company vulnerable to taxation on this basis is a question that may well be left to each state to decide for itself.

Future Action

It is to be hoped, therefore, that after considering the effects of the new tax on business and the economy, the states that have attempted to apply it will abandon it; that other states will desist from attempting it; and that the national associations that have been striving for years to promote equitable and sound methods of state and local business taxation will withhold endorsement from this dangerous new concept.

It is to be hoped, too, from an economic point of view, that the Supreme Court will find the mere solicitation of orders in a state an insufficient basis for imposing a state corporate income tax, and rule that any levy made on that basis is in violation of both the commerce clause and the due process clause.

Finally, it is to be hoped that Congress will bar the unwise and nationally harmful extension of state corporation income taxation into the domain of interstate commerce. These bars must be specific enough to prevent harmful state action and yet be broad enough to allow the states legitimate latitude in shaping their business income taxes according to their particular circumstances. No matter how the Supreme Court decides the constitutional issues involved, economic considerations make Congressional intervention of this kind absolutely necessary.

Exactly what form such federal legislation should take is a question that cannot be answered without a broad and competent study of all the issues and facts involved. Congress alone can make such a study, and it should organize one soon.

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No. 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

T. V. WILLIAMS as State Revenue Commissioner,
Petitioner,

v.

STOCKHAM VALVES AND FITTINGS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

With the written consent of the parties hereto, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Respondent, Stockham Valves and Fittings, Inc.

INTRODUCTORY STATEMENT

The National Association of Manufacturers is a no profit voluntary business league organized as a membe ship corporation under the laws of the State of Ne York. The Association is composed of more than 21,0 manufacturing concerns, including corporations, par nerships, sole proprietorships and other forms of bus ness enterprises, located throughout the United Stat and its territories. Most of these enterprises engage interstate commercial activities to some degree and u varying forms of sales techniques and marketi methods in the distribution of their products.

This case, as presented, as well as the related issu before the Court in other pending cases, may well affe virtually all business enterprises engaged in intersta commerce activities in connection with the marketi of their products. Thus, a significant segment of t manufacturing community has a vital interest in t issues before the Court in the instant case and co panion pending matters.

QUESTIONS PRESENTED

The questions presented by this case are wheth the State of Georgia may levy its general net inco tax on the interstate selling activities of the Respon ent taxpayer without violating the protection und the Constitution afforded by the commerce clause a the due process clause.

STATEMENT OF CASE AND RULING BELOW

This case does not turn on questions of fact sin the facts have been stipulated by the parties. The fore, the basic issues for decision by the Court a purely ones of law.

The sales and distribution methods employed by the taxpayer here are similar to such methods as used by many other business firms engaged in interstate commerce. The taxpayer here merely maintained a small sales office in Atlanta, Georgia, which serviced a territory of five southern states. A sales representative spent about one-third of his business time in Georgia, serving the other states in his assigned territory the balance of the time. The Atlanta office served as headquarters for this sales territory and a full-time secretary was in this office.

As noted in the stipulation of facts, the sales representative had no authority to accept orders, receive payment, pass on credit or contract on behalf of his employer. The function of this salesman in Georgia, and elsewhere, was merely to solicit orders, promote good will for his employer's products and seek out possible new customers for such products. All goods sold to customers in Georgia were shipped by carrier free on board a warehoue or plant of the taxpayer, all of which were physically located outside of the geographical limits of the State of Georgia. The corporation here had not qualified as a foreign corporation to do business in the state.

Respondent, contending that the Georgia apportioned, corporate net income tax was unconstitutional under the commerce clause and due process clause of the federal Constitution, filed suit for the recovery of taxes paid to the state for the tax years 1952, 1954 and 1955. The Superior Court of Fulton County, Georgia, on July 19, 1957, sustained the taxes as assessed and found that the tax statute "did not constitute a burden on interstate com-

merce nor were they levied or collected in violation of Due Process under the Federal Constitution." An appeal was taken from this trial court order directly to the Supreme Court of Georgia, which Court reversed the trial court on November 8, 1957. The State of Georgia petitioned this Court for a Writ of Certiorari. The Petition for a Writ of Certiorari to the Supreme Court of Georgia was granted by this Court on March, 17, 1958 (2 L. ed. 2d 585).

In deciding the Constitutional questions under the agreed facts of this case a basic element is the interstate nature of the activities of this taxpayer in Georgia. This element would appear to be resolved as a matter of law by the following statement of the Supreme Court of Georgia in its opinion below (213 Ga. 713, 101 S.E. 2d 197):

> "From the foregoing statement of facts it appears *without dispute* that the plaintiff was engaged *exclusively in interstate commerce insofar as its activities in Georgia are concerned.*" (Emphasis added)

ARGUMENT

I. THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES PROHIBITS THE STATES FROM TAXING INTERSTATE COMMERCE. THE ACTIVITIES OF THIS TAXPAYER IN GEORGIA WERE EXCLUSIVELY IN INTERSTATE COMMERCE AND THUS THE GEORGIA NET INCOME TAX IS UNCONSTITUTIONAL.

A. Power to Tax Commerce

The problem of defining the power of the states to levy taxes which may collide with powers delegated to the Congress by the commerce clause of the federal Constitution (Art. I, Sec. 8, Cl. 3) has generated a multitude of decisions by this Court. The Petitioner and the Respondent have each filed briefs reviewing

these decisions which have been referred to as "the tangled underbrush of past cases."[1] We do not believe, therefore, that we can aid the Court by presenting our own review of those cases.

We recognize that accommodating the taxing power of sovereign states with the powers delegated exclusively to the Congress often presents problems of great legal and economic difficulty. Nevertheless, identifying the basic questions presented here is simple; on the facts of this case, resolving such issues is equally simple.

We believe that the constitutional principle controlling this case is well stated in the *Spector Motor* case (footnote 1). In that case this Court made clear (p. 608):

1. That the states, in ratifying the Constitution, "have divided their taxing power between the Federal Government and themselves."

2. That the states delegated to the United States "the exclusive power to tax the privilege to engage in interstate commerce".

3. That, despite the great reach of the reserved taxing power of a state, "the constitutional separation of the federal and state powers makes it essential that *no state* be permitted to exercise, without authority from Congress, those functions which it has delegated *exclusively* to Congress."[2] (Emphasis added)

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[1] Dissent, *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 612, 95 L. ed. 573 (1951).

[2] "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the

The Court, in the *Spector* case, thus outlined in broad, yet sound, terms the powers and reservations of powers in this field of taxation.

While the Congress has many times broadly invoked its power to "regulate commerce" among the several States; it has not seen fit to do so in this area of taxation. Neither has it authorized the States to exercise the taxing functions "delegated exclusively to Congress." (See U. S. Const., Art. I, Sec. 8, Cl. 3)

The absence of Congressional expression has, therefore, necessitated judicial application of constitutional principles to interstate commercial activities as affected or touched on by a specific state statute which purports to invoke the inherent taxing power of the state. The Court below, in construing its state's net income tax statute, held (1) that Respondent was "engaged exclusively in interstate commerce insofar as its activities in Georgia are concerned," and (2) that, as applied to Respondent's activities, the state statute violated the Commerce Clause of the U. S. Constitution. We contend that the Georgia Supreme Court applied the proper constitutional principles in reaching its decision and that, on the basis of the Commerce Clause alone, Georgia did not have the right or constitutional power to levy the tax in question in this case.

United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power 'to regulate Commerce with foreign Nations, and among the several States . . .' U. S. Const., Art I, Sec. 8, Cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." (p. 608)

B. Nature and Incidence of the Tax

In determining whether a state tax will stand constitutional challenge, this Court has said in the *Spector* case, *supra* (p. 608) it is not "a matter of labels", but rather the "incidence of the tax provides the answer." In ascertaining the "operating incidence" of a state tax, this Court looks for persuasive guidance to the state courts as to the nature of the tax involved.

In the instant case, the Supreme Court of Georgia has construed the statute of that state and thus has provided this Court with a weighty answer as to the nature and incidence of the tax in issue. Holding that an income tax is in the nature of an excise tax, the Georgia Court stated:

> "Counsel for the defendant contend that a tax on net income does not stand upon the same basis and is not the equivalent of a license, occupation, franchise, or privilege tax on interstate commerce; but, as previously pointed out, *we have held that an income tax is in the nature of an excise tax*, . . ."[3] (Emphasis added)

Here then the highest tribunal of the state found (1) that the taxpayer is engaged exclusively in interstate commerce and, (2) that the tax sought to be imposed is an excise tax. Having determined these factors, it would follow that an excise tax, or a tax

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[3] The Georgia Supreme Court also noted that it had previously considered the incidence of the income tax by stating:

> "In *Forrester* v. *Culpepper*, 194 Ga. 744, 748 (22 S.E. 2d 595), this court quoted with approval from *Interstate Bond Co.* v. *State Revenue Com.*, 50 Ga. App. 744, 751 (179 S.E. 559), the following: 'The general view is that an income tax is not a property tax, but more in the nature of an excise tax.'"

in the nature of an excise tax, as applied to interstate commercial activities, must fall as being violative of the constitutional prohibition against the sole right of the federal government to regulate, and tax, commerce.[4]

Petitioner here would have the Court believe otherwise by the use of labels and semantics designed to be persuasive of the contention that a so-called net income tax is in a special category or is immune from the constitutional proscriptions (p. 28, Pet. Br.). We respectfully submit that these arguments are specious for they disregard the realities of the economic impact of the tax and its practical application in attaching to the flow of interstate commerce. The Supreme Court of Pennsylvania in a recent case[5] holding the net income tax of that state unconstitutional forcefully responded to a similar contention by noting:

> "The Corporation Income Tax Law of 1951 states that it imposes a property tax on net income of certain corporations. While this declaration is entitled to weight, *the nature of a tax depends upon its incidence, not upon its label. If, therefore, in reality, i.e. in its practical operation and effect, the tax is not what it purports to be, the realities control.*" (Emphasis added)

The state would also advocate in support of its tax that it does not burden interstate commerce because

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[4] Respondent has extensively discussed the cases which support this principle. Attention is directed to the leading cases of *Cheney Brothers Co.* v. *Mass.*, 246 U.S. 147, 62 L. ed. 632 (1918); *Alpha Portland Cement Co.* v. *Mass.*, 268 U.S. 203, 69 L. ed 916 (1925); *Spector Motor Service* v. *O'Connor, supra.*

[5] *Commonwealth of Pennsylvania* v. *Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100, *cert. denied*, 352 U.S. 952 (1956).

it is non-discriminatory, i.e. that ". . . it applies without discrimination to non-residents and foreign corporations as well as residents and domestic corporations . . ." (p. 28, Pet. Br.). Such argument is not new nor has it acquired a new luster because of reiteration. This Court has met such contentions previously and in *Freeman* v. *Hewit,* 329 U.S. 249, 91 L. ed. 265 (1946), Mr. Justice Frankfurter noted that the commerce clause was more than an authorization to Congress to protect and encourage commerce, it also created an area of trade free from interference by the states. It was also stated (p. 252):

> "A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. *It is immaterial that local commerce is subjected to a similar encumbrance.* It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and privilege. *But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.*" (Emphasis added)

This opinion then continues by responding to the non-discrimination argument by noting (p. 254):

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. *It cannot justify what amounts to a levy upon the very process*

> *of commerce across State lines by pointing to a similar hobble on its local trade.* It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while *the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce.*" (Emphasis added)

We have quoted extensively from this opinion to point up that notwithstanding the claims of non-discrimination, the "realities" of the tax at hand are such that it exacts a toll from those engaged in national commerce and thereby blocks and impedes such commerce. Such impediment arises out of the actual economic thrust of such a tax.

The Petitioner also seeks to justify the tax by noting that "it is a substantial source of revenue and means of distributing the costs of state government" (p. 28, Pet. Br.). We recognize the needs and desires of the sovereign states to raise revenues sufficient to perform essential functions of government. Yet need for revenue can hardly justify an unconstitutional exercise of the taxing power. The means and methods employed here have been found, we believe correctly, by the Supreme Court of Georgia to trespass upon a power delegated exclusively to the United States which has not authorized the states to act. We believe therefore that the commerce clause, standing alone, prevents Georgia from enforcing its income tax statute in the instant case.

C. Multiple Burden Imposed on Interstate Commercial Activities by Net Income Tax Statutes of the Type Herein Involved

While we believe this case can and should be disposed of on the basis of the power to regulate commerce delegated exclusively to the Congress of the United States, we feel we must also suggest for consideration by the Court certain economic factors touched on by Petitioners.

As we have earlier indicated, the arguments of Petitioner are specious because they disregard the economic realities of the tax here sought to be upheld insofar as it relates to commercial activities in the stream of interstate commerce. One of the "realities" that must be considered in evaluating the constitutional validity of such taxes as are here involved is their broad economic impact. We submit that effectively to dispose of the issues at hand, the Court must look not only to the facts and posture of the instant case, but also consider the actual economic burdens that imposition of such taxes creates for those businesses engaged exclusively in interstate commerce.

One important aspect of this economic impact is the substantial administrative cost of record-keeping in order to comply with the income tax requirements under the present status of the law. Extending the taxing power of the states as advocated here by the Petitioner would soon create an intolerable and highly expensive problem of compliance. If the contentions of the Petitioner are upheld, it can be expected that many other, if not all, of the states would quickly revise their tax laws to embody this concept. However, as is noted below, there would be no uniformity or consistency in the formulas or mechanics of the taxes

so adopted. Such lack of uniformity and consistency would serve to compound the administrative problems and economic thrust of such taxes.

Another impact of such a tax has to do with the actual effect such taxes have in burdening interstate business. The factors of such a tax impeding the flow of commerce can best be illustrated by specific illustrations.

Admittedly, the full scope and impact of this problem is presently an unknown quantity and thus any illustrative or statistical examples can only be currently based on limited samplings. Such samplings are, however, very revealing and may be of interest to the Court.

In July, 1958, the Law Department of this Association conducted an informal survey among the companies represented on the Association's Committee on Taxation. This Committee is composed of executives and tax specialists from approximately 300 business firms manufacturing a variety of products and selling such products under a variety of distribution methods. The representation on this Committee is quite broad as it is made up of companies of all sizes, from all sections of the country, marketing a tremendous array of products so common and essential to our economy.

The questionnaire circulated was simple—by design—and incorporated only three questions. The first question asked for gross sales during the last fiscal year; the second question asked "in how many states did your company have salesmen or did salesmen representing your company travel with some degree of regularity during your last fiscal year." The third question requested "in how many states did your company file tax returns measured by net income for its

last fiscal year." The replies to this questionnaire were on a "blind" basis, that is to say the sender was not required or requested to identify his company.

Replies were received from 178 sources, but of these replies 35 had to be set aside as not responsive, principally because the majority of such responses were from public utilities, banks, insurance companies, or other firms having a similar "special" status. Of the remaining 143 replies there were 4 that were in a further separate category as the companies responding used manufacturers' agents, jobbers or other independent distributors in the distribution and sales of their products.

The remaining 139 replies do provide a revealing insight into the "realities" of the problem. Particularly revealing is the prospective economic impact on smaller and medium-sized companies if this Court upholds the Constitutional validity of the so-called apportioned net income taxes.

The breakdown of the data received is as follows:

Companies Having Annual Sales In Excess of $25,000,000

Total replies received in this group	74
Number of states covered by salesmen	
21 or more states	65
11 — 20 states	8
6 — 10 states	
5 or less	1
	74

Companies paying net income taxes in	
11 or more states	47
6 — 10 states	14
5 — no states	13
	74

Companies Having Annual Sales of $25,000,000 or Less

Total replies received in this group	65
Number of states covered by salesmen	
21 or more states	37
11 — 20 states	4
6 — 10 states	10
5 or less	14
	65

Companies paying net income taxes in	
11 or more states	2
6 — 10 states	10
* 5 — no states	53
	65

* A further breakdown of this category shows:

Number of states	Number of companies
0	9
1	32
2	3
3	4
4	2
5	3
	53

The foregoing figures indicate that many of the larger companies, i.e. those with annual sales in excess of $25,000,000, are now paying income taxes to the various states. Of the 74 companies responding, over half—47—were now paying such taxes in 11 or more states. However, of these companies many maintained warehouses or stocks of goods locally, were qualified to do business in various states or had other reasons for coming within the taxing jurisdiction of the states involved. Moreover, of the 74 companies responding, 65 had salesmen covering 21 or more states, with a major element of this group covering all of the states.

As to the smaller companies responding, that is those with annual sales of less than $25,000,000, 53 companies now paid net income taxes to 5 or less states, 10 companies paid in 6 to 10 states and only 2 companies were currently paying such taxes in 11 or more states. However, in this category there were 37 companies with sales personnel who covered more than 21 states on a regular basis. It should be particularly noted that of the 53 companies in the category involving 5 or less states, these figures show that 32 of such companies were now paying in only one state and it is reasonable to assume that of this group such net income taxes were being paid because of domicile, qualification to do business, warehousing or other comparable factors. Nine of the companies responding did not pay net income taxes in any state even though marketing in interstate commerce.

What the future portends for the smaller and medium-sized companies if the Georgia tax is upheld seems to be obvious. Such companies will immediately be brought into the expanded orbit of paying such

taxes, for it is apparent that if the Georgia tax statute is upheld here, other taxing jurisdictions will soon follow a similar pattern. This observation, we might note, is not based on speculation, but has a sound basis in fact as demonstrated by the developments in recent years following other litigation. That is not to say, however, that larger companies would not be similarly affected for it would appear to follow that more and more companies would be caught up in the taxing activities of more and more states, with the resulting economic burden and impact on interstate commerce.

The foregoing information shows, we believe, that even under the present uncertain status of the law, the ever-increasing encroachments by the various states pursuing the apportioned net income means of taxing interstate commerce has created problems of substantial magnitude. Presently, more and more states are seeking to collect such taxes because of the solicitation activities of salesmen whose activities are an integral part of the flow of commerce. If the lower court is overturned, these diverse, cumulative and inconsistent state tax exactions and reporting requirements would create problems of a scope difficult presently to demonstrate or to fully comprehend. In many areas of business the exactions of state taxes would be such as to cause serious disruptions in established methods of distribution and to give rise to cumulative costs far out of proportion to any purported concomitant benefits.

Petitioner has also raised in its brief (pp. 52-53) the issue of apportionment formulas and rather quickly passes over a further serious practical aspect

of the problem. The State notes that while it is logically impossible to have the same income taxed twice, practically "it could happen". We point out to the Court that taxation of over 100% of net income not only "could happen" under the varying and diverse apportionment formulas in present use—it does happen—with the prospects for alleviation through a uniformity of formulas most unlikely.

While recognizing that this Court has expressed itself on the use of non-discriminatory apportionment formulas,[6] the rationale of these expressions and cases is no doubt limited to discriminations within a given state and not the impact of the whole range of state taxes and the total effect on interstate business. It is the totality of the impact of such taxes that we respectfully urge this Court to consider and weigh in its deliberations.

Petitioner indicates in its brief (p. 52) that "It may be that formula uniformity among income-taxing states is a desirable thing." Assuming, arguendo, that the underlying legal and Constitutional problems can be resolved, a uniform apportionment and allocation concept among the various states does not seem possible of solution as a practical matter, even though it presents a logical theory.

The National Tax Association, and equally respected organizations,[7] have endeavored for many

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[6] Illustrative cases on this point are, *Shaffer* v. *Carter*, 252 U.S. 37, 64 L. ed. 445 (1920); *Underwood Typewriter Co.* v. *Chamberlin*, 254 U.S. 113, 65 L. ed. 165 (1920); and *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 75 L. ed. 879 (1931).

[7] E.g. Report of National Conference of Commissioners on Uniform State Laws, 82 Reports of American Bar Association, p. 174 (1957).

years to develop a workable and acceptable solution to the uniform apportionment problem. However, in all the intervening years the major obstacle to acceptance by the various jurisdictions was the impossibility of harmonizing and reconciling the divergent interests of consuming states and manufacturing states. One element of the uniform apportionment of income concept that arouses such controversy and non-uniform acceptance is the use of the sales-by-destination or sales-by-site-of-solicitation factor. Manufacturing states are reluctant to use this factor in their apportionment formulas and thus, while the theory may be logical, the realities are not. Acceptance is no closer than it was when such studies were initiated back in 1919.

It has been suggested by many authorities in this field of taxation as well as by Petitioner in its brief (p. 52) that "the nature of the problem, with all of its complexities, suggests that any solution of this type [formula uniformity] ought to come from Congress." With this observation we would agree, but, again, facing the practical realities of the situation, there appears to be a notable reluctance on the part of the Congress to accept the problem, let alone effect a workable solution.

An illustration to document this statement is found in a 1953 report of the Committee on Ways and Means, U. S. House of Representatives[8] wherein that committee, which under the Constitution originates tax legislation, made the following comment on state tax jurisdiction (p. 46):

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[8] H. Rept. 2519, 82d Cong., 2d Sess., (1953) "Coordination of Federal, State and Local Taxes".

"Basically, State taxation of business income is much more difficult than Federal taxation since geographic division of income derived from interstate business is necessarily arbitrary to a certain extent. Accordingly, competing jurisdictional claims of the States and multiple taxation of income derived from interstate business are among the most difficult problems in corporate income taxation. *This is inherently a matter for coordination among the several states and not between the Federal Government and the States.*" (Emphasis added)

Moreover, this Congressional Committee, in the same report (p. 48), made the following observations which supports our contentions outlined above:

"Study of this problem at both the Federal and State levels revealed the difficulties involved in developing a formula which would be acceptable to all States. *States which would benefit from a specific formula might be willing to adopt the uniform statute while others to which the formula proved disadvantageous would not accept it. Yet multiple taxation could be prevented only if the uniform statute were adopted universally.*" (Emphasis added)

Thus, it seems clear that notwithstanding the possible logic, economic as well as legal, uniform apportionment is unlikely of achievement and, moreover, the Congress seems to be unwilling at this time to invoke the authority vested by the Constitution. In fact, the Ways and Means Committee has expressly indicated that this is a matter for coordination among the states.

II. THE DUE PROCESS CLAUSE OF AMENDMENT XIV TO THE CONSTITUTION PRECLUDES THE TAXING OF INTERSTATE COMMERCIAL ACTIVITIES.

We believe that Petitioner in its brief (pp. 34-48) has either ignored or inadvertently merged two basic distinctions and legal issues that arise under the due process clause.

The first distinction that arises under this clause has to do with the jurisdiction of the courts of a state over a defendant and whether such person is amenable to the process of such state in an *in personam* action. As to this phase of the problem, it has probably been resolved to some degree by the recent case of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.ed. 2d 223, decided by this Court on December 16, 1957.[9] However, this case seems to be limited to whether a foreign corporation and other non-residents are amenable to the jurisdiction of the courts and process of another state where such defendant is given a reasonable time to appear and defend on the merits. In any event, whether or not Georgia met the requirements of procedural due process is not at issue in the instant matter.

The feature of due process protection that is at issue and should be so drawn is whether a state has substantive jurisdiction over the subject matter—in this instance the right to levy and enforce the net income tax on the interstate activities of the taxpayer.

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[9] But cf., *Hanson* v. *Denckla*, 2 L. ed. 1283 (June 23, 1958), which notes legal restrictions on the personal jurisdiction of state courts as being "territorial limitations on the power of the respective States."

It is in this area that the Petitioner does not delineate the legal distinctions between the two concepts arising under the due process clause. For example, Petitioner makes extensive references to the language of this Court in the case of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 90 L.ed. 95 (1945), which purport to establish as law that the "presence" of the taxpayer here was such as to make it subject to tax. However, examination of the *International Shoe* case reveals that the references of this Court to the "presence" of the Shoe Company and the "nature and quality" of its activities in the State of Washington relate only to whether the company was amenable to the process and jurisdiction of the courts of that state. This Court found that the activities of International Shoe Company and its agents within that state were such that it was amenable to suit in Washington courts. This is an entirely different issue and is not present here. The issue under due process here is the jurisdiction to levy the tax in the first instance. As to that issue there is nothing in the *International Shoe* opinion to guide here since the type and nature of the Washington tax involved bears no relationship to the type, nature or incidence of the tax at issue in this litigation.

We concur with the views expressed by the Georgia Supreme Court when it held that there was a denial of due process because the state sought to tax activities carried on outside its borders. Thereafter, the Court below cited the principle expressed by this Court in the case of *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340, 98 L.ed. 744 (1954). Reference to this language may again be helpful (p. 344):

"The question here is whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. * * * Our decisions are not always clear as to the grounds on which a tax is supported, * * *; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. * * * *But the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.*

"* * * Certain activities or transactions carried on within a state, such as the use and sale of property, may give jurisdiction to tax whomsoever engages therein, and the use of highways may subject the use to certain types of taxation. These cases overlap with those in which incorporation by a state or permission to do business there forms the basis for proportionate taxation of a company, including its franchise, capital, income and property." (Footnotes omitted, emphasis added)

This statement, as well as others by this Court, returns us to the proposition that the operating incidence of the tax is fundamental in determining liability for the tax. Depending upon the nature of the business of the taxpayer, the incidence of the tax and the factual elements, the taxing powers of a state may or may not be exercised. Thus, domiciliaries may be taxed, sales and use may be taxed, as may be the privilege of employing salesmen within a state. Nevertheless, mere solicitation, however continuous, is

not a sufficient contact with the taxing state to justify the levying of the Georgia net income tax in light of the prohibitions of the Fourteenth Amendment.

CONCLUSION

1. The interstate sales techniques and distribution methods of a large segment of the manufacturing community are essentially identical to the methods employed in this case by the Respondent, Stockham Valves and Fittings, Inc. Commercial activities of this character are such an integral part of the flow of interstate commerce that to levy state net income taxes on such activities violates the Commerce Clause of the Constitution.

2. The multiple economic burdens that attach to interstate commerce under an apportioned net income tax block and impede commerce to an extent and degree that tax statutes of this type contravene the protections afforded business between the states under the Constitution.

3. To impose apportioned net income taxes upon sellers engaged in interstate commercial activities, whose only contact with the taxing state is solicitation, no matter how continuous, is to violate the due process clause of the Fourteenth Amendment.

For the foregoing reasons it is respectfully submitted that the decision of the Supreme Court of Georgia is

correct and should be upheld in its entirety by this Court.

Respectfully submitted,

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